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TRADE AND DEVELOPMENT BOARD
Ad Hoc Working Group on Trading Opportunities
in the New International Trading Context
Second session
Geneva, 5 February 1996
Item 1 of the provisional agenda

ADOPTION OF THE AGENDA AND ORGANIZATION OF WORK

Provisional agenda and annotations for the second session of the Ad Hoc Working Group

I. PROVISIONAL AGENDA

1. Adoption of the agenda and organization of work

2. Enhancement of the understanding of the implications of the new rules deriving from the Uruguay Round agreements and their follow-up, and identification of where and how developing countries and economies in transition concerned could be assisted to:

   (a) make use of the special clauses of the Final Act providing differential and more favourable treatment; and

   (b) implement and benefit from the commitments undertaken

3. Identification of areas in which technical cooperation should be strengthened

4. Other business

5. Adoption of the final report of the Ad Hoc Working Group to the Trade and Development Board.

GE.95-53766

II. ANNOTATIONS TO THE PROVISIONAL AGENDA

Item 1. Adoption of the agenda and organization of work

The provisional agenda for the second session was approved by the Ad Hoc Working Group at its first session.

A proposal for the organization of work of the second session is given in section III below.

Item 2. Enhancement of the understanding of the implications of the new rules deriving from the Uruguay Round agreements and their follow-up, and identification of where and how developing countries and economies in transition concerned could be assisted to:

(a) make use of the special clauses of the Final Act providing differential and more favourable treatment; and

(b) implement and benefit from the commitments undertaken

The report on this item (TD/B/WG.8/6) analyses the trading opportunities with respect to three "contingency protection" agreements of the Uruguay Round, i.e. on safeguards, on anti-dumping practices and on subsidies and countervailing measures, to see to what extent these agreements and the national implementing legislation of the major trading nations present new trading opportunities for developing countries and countries in transition. The report seeks to identify the particular benefits arising from the application of differential and more favourable treatment and the difficulties developing countries may face in implementing and benefiting from these commitments.

Documentation

TD/B/WG.8/6 — An analysis of the implications of the new rules deriving from the Uruguay Round agreements on safeguards, anti-dumping, and subsidies and countervailing measures - report by the UNCTAD secretariat

Item 3. Identification of areas in which technical cooperation should be strengthened

The report on this item (TD/B/WG.8/7) focuses, in the context of the terms of reference of the Ad Hoc Working Group, on the main problems for enhancing the participation of developing countries and economies in transition in the post-Uruguay Round international trading system and the identification of priority areas for technical cooperation, including national policy-making, institutional capacity building and human resource development, and participation in the multilateral and regional frameworks and negotiations processes.

Documentation

TD/B/WG.8/7 — The new international trading context: identification of areas for strengthened technical cooperation - report by the UNCTAD secretariat

Item 4. Other business

Item 5. Adoption of the final report of the Ad Hoc Working Group to the Trade

and Development Board

Paragraph 7 of the terms of reference of the Ad Hoc Working Group states that the Group "shall submit a final report on the results of its work to the Trade and Development Board". The final report of the Ad Hoc Working Group will be considered by the Trade and Development Board at its eighteenth special session in December 1995.

III. TENTATIVE ORGANIZATION OF WORK

Monday, 4 December	a.m.	Opening of the session Item 2 of the provisional agenda "Enhancement of the understanding of the implications of the new rules deriving from the Uruguay Round agreements and their follow-up, and identification of where and how developing countries and economies in transition concerned could be assisted to: (a) make use of the special clauses of the Final Act providing differential and more favourable treatment; and (b) implement and benefit from the commitments undertaken". Informal discussions on item 2*

* To assist the Ad Hoc Working Group in its deliberations on Item 2, in particular to enhance the understanding of the implications of the new "contingency protection" agreements of the Uruguay Round and their follow-up for developing countries and countries in transition concerned, a panel of experts is being convened to share its views with the Ad Hoc Working Group at its informal deliberations immediately after the opening session of Group on Monday morning, 4 December 1995. These experts are mainly private practitioners in contingency protection trade law and the panel will focus its informal deliberations on: (i) the trading opportunities resulting from three "contingency protection" agreements of the Uruguay Round, i.e. safeguards, anti-dumping practices and subsidies and countervailing measures as to what extent these agreements and the relevant national implementing legislation of the major trading nations present new trading opportunities for developing countries and countries in transition concerned and provide the security for those opportunities; (ii) the identification, with some case studies, of the extent to which the Uruguay Round agreements and the new implementing legislation represent an improvement from the previous system; (iii) the identification of the particular benefits arising from the application of differential and more favourable treatment and the difficulties developing countries and countries in transition concerned may face in implementing and benefitting from the commitments undertaken under these agreements; (iv) the identification of areas in which technical assistance should be strengthened, having in mind the respective problems faced by developing countries and countries in transition concerned.

	p.m.	Informal discussions on item 2 (continued)
Tuesday, 5 December	a.m.	Informal discussions on item 2 (continued)
	p.m.	Formal discussions on item 2
Wednesday, 6 December	a.m.	Item 3 of the provisional agenda Identification of areas in which technical cooperation should be strengthened Formal discussions on item 3
	p.m.	Formal discussions on item 3
Thursday, 7 December	a.m.	Informal consultations on items 2, 3 and 4
	p.m.	No meeting, to allow time for the preparation of the draft report.
Friday, 8 December	a.m.	Idem
	p.m.	Adoption of the final report of the Ad Hoc Working Group to the Trade and Development Board

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TRADE AND DEVELOPMENT BOARD
Ad Hoc Working Group on Trading Opportunities
in the New International Trading Context
Second session
Geneva, 4 December 1995
Item 2 of the provisional agenda

ENHANCEMENT OF THE UNDERSTANDING OF THE IMPLICATIONS OF THE NEW RULES DERIVING FROM THE URUGUAY ROUND AGREEMENTS AND THEIR FOLLOW-UP, AND IDENTIFICATION OF WHERE AND HOW DEVELOPING COUNTRIES AND ECONOMIES IN TRANSITION CONCERNED COULD BE ASSISTED TO: (A) MAKE USE OF THE SPECIAL CLAUSES OF THE FINAL ACT PROVIDING DIFFERENTIAL AND MORE FAVOURABLE TREATMENT; AND (B) IMPLEMENT AND BENEFIT FROM THE COMMITMENTS UNDERTAKEN

Report by the UNCTAD secretariat

GE.95-53988

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Abbreviations

AAD	Agreement on Anti-Dumping Practice
AD	Anti-Dumping (action or measure)
ASCVM	Agreement on Subsidies and Countervailing Measures
ASG	Agreement on Safeguards
CITT	Canadian International Trade Tribunal (Act)
CVD	Countervailing Duty
EC	European Community (or Communities)
EU	European Union
GATT	General Agreement on Tariffs and Trade
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
OMAs	orderly marketing arrangements (agreements)
PPMs	Processes and Production Methods
R&D	research and development
SAA	Statement of Administrative Action (United States)
SGA	selling, general and administrative (expenses)
SIMA	Special Import Measures Act (Canada)
SPS	Sanitary and Phytosanitary Measures (Agreement on)
TBT	Technical Barriers to Trade (Agreement on)
UNCTAD	United Nations Conference on Trade and Development
URAA	Uruguay Round Agreements Act (United States)
USITC	United States International Trade Commission
USTR	United States Trade Representative
VERs	voluntary export restraints
VIEs	voluntary import expansions
WTO	World Trade Organization

INTRODUCTION

1. The Ad Hoc Working Group on Trading Opportunities in the New International Trading Context is requested "to enhance the understanding of the implications of the new rules deriving from the Uruguay Round agreements and their follow-up, and to identify where and how developing countries and economies in transition concerned could be assisted to: (a) make use of the special clauses of the Final Act providing differential and more favourable treatment; and (b) implement and benefit from the commitments undertaken". In doing so, the Ad Hoc Group "shall take into account in particular the Board's in-depth analysis and assessment of the outcome of the Uruguay Round". In the Agreed Conclusions of the 41st Session of the Trade and Development Board, which considered the assessment by the contained in TDR/14 Part III and TDR/14 Supplement, governments agreed that there was a need for more policy analysis with a view to making concrete proposals , and that this work should lead to a better understanding of problems and the identification of opportunities at the national level. [1]

2. At its first session, the Ad Hoc Group examined the trading opportunities resulting from the Uruguay Round in selected sectors, with special attention being given to agriculture, and textiles and clothing.[2] This report focuses on three Multilateral Trade Agreements, on Safeguards, on Anti-Dumping Practices and on Subsidies and Countervailing Measures. These were chosen for special attention in recognition that, with the reduction in tariffs and other fixed measures at the frontier, the applications of emergency safeguard action, anti-dumping and countervailing duties, often termed "contingency" trade measures (or "trade remedy" agreements by those of more protectionist perspectives), have become increasingly frequent, and are the most important form of trade restriction encountered by developing countries. For this reason, the tightening of the multilateral rules governing resort to such measures, to prevent their abuse as a means for "trade harassment" was one of the main objectives of developing countries during the Uruguay Round, and their interests in this respect were recognized as far back as UNCTAD VI.[3]

3. This report builds upon the analysis of the Agreements concerned and of the provisions for differential and more favourable treatment contained in TDR/14/Supplement. That assessment was carried out before the implementing legislation of the major trading countries had been drawn up. However, trade opportunities resulting from these Agreements are defended primarily in the context of the domestic legislation of the importing country, and therefore an intimate understanding of such legislation is needed for developing countries and economies in transition be able to identify, and derive benefit from the opportunities arising from the improved multilateral rules. Only in cases where they perceive clear departure from the rules would it be expected that exporting countries would pursue their rights within the WTO framework.

4. It should be noted that at this stage, the analysis can only be considered as preliminary and illustrative,[4] because: (i) the implementation of the Uruguay Round Agreements is still at an early stage; (ii) the process of reviewing national anti-dumping, countervailing and safeguards legislation within the context of the WTO Committees is not yet completed; (ii) there have been relatively few investigations in 1995 which can be used to assess the impact of new legislation on trade flows and on the interests of developing countries;[5] and (iv) only the legislation of three trading entities has been examined.

SUMMARY AND CONCLUSIONS

5. In general, the new rules on safeguards, anti-dumping, and subsidies and countervailing measures deriving from the Uruguay Round Agreements will improve trading opportunities by providing considerably greater security of market access particularly for developing countries. The multilateral trading system has become more predictable and transparent in these areas where the absence of international consensus and workable rules and procedures had given rise to frequent trade tensions and disputes.

6. The **Agreement on Safeguards** provides a clear definition of serious injury and time limits on the duration of safeguard actions, requires non-discriminatory application, and establishes review requirements for progressive liberalization of safeguard measures and conditions for reimposition of them. It sets up a new surveillance mechanism on the form of a Committee on Safeguards. Most importantly, it prohibits countries from seeking to impose discriminatory restrictions on weaker partners outside the disciplines of GATT and requires the elimination of grey-area measures.

7. The **Agreement on Anti-Dumping Practices** has made a number of methodological and procedural changes and shows clearly that an attempt has been made to improve on vague or imprecise formulations in the Tokyo Round Code. The benefits that exporters are expected to enjoy mainly include improved rules relating to: constructed value and determination of profit for constructed value, sales below cost and start-up costs, price comparison, price averaging, standing, price undertakings, de minimis clauses, reviews and sunset provisions. In several instances, the changes have clarified the rules or made them precise through numerical standards, for example, the "5 per cent rule".

8. The **Agreement on Subsidies and Countervailing Measures** reflects a carefully negotiated balance between more rigorous disciplines on subsidies and reforms of countervailing duty procedures and remedies. The important benefits of the ASCVM are: (1) the introduction of an internationally agreed definition of subsidy; (2) the creation of a category of subsidies which are exempt from the application of countervailing duties, provided that certain criteria are met; (3) a de minimis rule relating to the value of a subsidy, which should exempt many domestic programs and practices from the imposition of countervailing duties while this exemption does not preclude challenging and investigating these subsidies; and (4) the inclusion of more flexible provisions which recognize the importance of subsidies in the transition process to a market-based economy, providing countries in transition with important exceptions from the prohibition on export subsidies.

9. These agreements will result in increased harmonization in legislation and administration among WTO members. In many cases, they have codified an alignment with the laws or administrative practices of either the United States, Canada or the EU. Many important elements of these agreements have been faithfully reflected in the implementation legislation of the EU, Canada and the United States in terms of improved transparency and clearer rules such as strict duration of safeguard measures, opportunities for the submission of comments by a broader range of interested parties, de minimis rules, reviews, a sunset clause, and applying the "injury test" in countervailing duty investigations to all WTO members.

10. However, in some important areas, the concrete market opportunities are less clear. The alignment on the practices of a given country has not always been with reference to the most liberal practice. Certain provisions which had been of concern to developing countries such as the "cross cumulation" of injury of subsidized or dumped imports have been codified and retained. Furthermore, some elements of the Agreements themselves or areas where the Agreements are silent could give rise to concern to many developing countries, and countries in transition. These concerns include: the "quota modulation", effectiveness of the prohibition on VERs and the treatment of the so-called "non-market economies", etc. There is also some important remaining business, notably, no solution has been found regarding the anti-circumvention of dumping issue, which has been referred to the WTO Committee on Anti-Dumping Practices.

11. While exporters normally recruit domestic legal counsel to defend them when faced with the threat of safeguard actions, anti-dumping or countervailing duties, their governments can provide support in helping them to assert their rights, take preemptive action at the diplomatic level and assist them in conforming to the necessary procedures with respect to investigations and the provision of information. In particular, recourse to anti-dumping actions may

become the preferred "trade remedy" for protectionist interests. Thus, it would seem especially important for developing countries to monitor closely the process of implementation of these provisions into trade practices by the main users of anti-dumping measures and to strengthen their capacity to apply such measures in conformity with WTO agreements.

12. Anti-dumping, countervailing and emergency safeguard measures have been resorted to sparingly by the developing countries, mainly since they previously maintained a series of traditional tools for controlling imports, at their disposal. However, with the reduction and binding of tariffs and the disinvocation of Article XVIII:B., the governments of these countries have been under increased pressure to use the GATT/WTO consistent anti-dumping and countervailing measures and emergency safeguard action. Many developing countries have only recently introduced, or are in the process of introducing, legislation in these areas, and are faced with the challenge of incorporating these agreements into the framework of their own legal systems. This may require the development of new expertise and technical assistance from the international community.

13. As non-WTO member countries will not necessarily benefit from the improved rules, and may continue to face trade restrictive actions based on discriminatory criteria, (designed to deal with "non-market economies) their concerns should also be addressed. There should be an understanding to apply the new rules as far as possible on a de facto basis to those countries in the process of accession in order to foster their full integration into the international trading system.

14. Some outstanding questions may arise from the difficulties in adapting these traditional trade policy mechanisms to the realities of globalization. The Agreement on Safeguards recognizes the possibility that private firms may collude to restrict trade in the same manner as the prohibited VERs and CMAs, and suggestions have been made for dealing with such problems through a multilateral instrument on competition policy. Similarly, the perceived need for measures to deal with the "circumvention" of anti-dumping duties illustrated the difficulties in applying concepts which assumed that production took place within national boundaries, to situations arising in the real world of globalized production, and where the behavior and strategies of firms have become quite different. Such conflicts between traditional concepts and mechanisms and the current realities can be found in many aspects of the Agreements in question. It is also pertinent to note that the "non-actionable" subsidies include measures to support research and development cost of firms, subsidies in favour of disadvantaged regions within countries and subsidies compensating environmental costs which would otherwise be borne by firms.

I. SAFEGUARDS

A. Overview of the agreement on safeguards[6]

15. The tendency to circumvent GATT Article XIX through resort to selective trade-restrictive measures, mainly voluntary export restraints (VERs) taken outside of the legal framework of the GATT (i.e. the so-called "grey-area" measures), and increasingly applied to the trade of developing countries, was recognized as constituting a major threat to the integrity of the multilateral trading system. The negotiation of a multilateral safeguards agreement in the Tokyo Round failed due to lack of agreement on the possibilities for departure from the MFN obligation. Therefore, arriving at an international consensus on an effective and efficient multilateral safeguard system for the application of GATT Article XIX held paramount importance in the Uruguay Round.

16. It was perceived that the tendency to circumvent Article XIX arose from the unwillingness of countries to conform, in particular, to the requirements that (i) such actions should be compatible with the MFN principle, which precluded discrimination among sources of imports; (ii) compensation should be

provided to affected countries in the absence of which retaliatory actions could be applied; (iii) a difficult standard of "serious injury" had to be met. In addition, the rules for the application of Article XIX were vague, for example the absence of specific time-limits resulted in "emergency" measures remaining in place for extended periods.

17. The Agreement on Safeguards (ASG) has clarified and reinforced the disciplines for the application of safeguard measures. It has reaffirmed that such measures must be applied to "a product being imported irrespective of its source", in other words, on an MFN basis (article 2.2), in principle, it prohibits discriminatory actions against weaker trading partners and thus improve their trading prospects, and (bearing in mind the "quota modulation" provision) should prevent discriminatory actions against weaker trading partners and improve their trading prospects.

18. The Agreement also establishes clear investigatory procedures for the application of such measures, which include reasonable public notice, public hearings and other appropriate means for importers, exporters and other interested parties to present evidence and their views, as well as for notification and consultation (articles 3:1 and 12). This is clearly reflected in the implementing legislation. The EU now expressly provides for the right of the interested parties (including exporters) to comment on the information supplied by other parties concerned. The United States provides interested parties at hearings the opportunity to respond to the presentations of other parties (including exporters) and consumers. The Canadian regulations also give interested parties (including exporters) opportunities at the public hearing to explain their case before a panel of the International Trade Tribunal and to question witnesses.[7]

19. The criteria of "serious injury", "threat of serious injury" and "domestic industry" (article 4), are defined more precisely. These definitions have been added to the new EU regulation, which was previously silent on these points. It also requires that factors other than trends in imports that are causing or may have caused injury to the Community producers concerned be examined. The Canadian law defines "serious injury" and "threat of serious injury" in line with the requirements of the ASG. The United States clarified the meaning of the term "domestic industry" and added the terms "serious injury"[8] and "threat of serious injury".

20. The ASG introduces time limits on the use and extension of safeguard measures with a maximum eight-year duration (article 7); it also establishes review requirements for progressive liberalization of safeguard measures and conditions for their reimposition (article 7). The new EU regulation contains identical provisions to the ASG on the duration, extension, progressive liberalization and the review of safeguard measures (the previous EU regulation was silent in this regard). It also recognizes the authority of the WTO Committee on Safeguards and provides for consultations within this Committee if the duration of a safeguard measure exceeds three years. The previous US law permitted safeguard measures for up to eight years. The new US law brought these provisions into conformity with the ASG. When a safeguard measure is provided for more than one year it must be phased down at regular intervals instead of previously three years. Conditions for the reimposition of safeguard measures are also added to the new US law.

21. The compensation requirement is waived for the first three years (article 8:3); this provision rewards countries which follow the letter of the ASG.

22. Most importantly, the ASG prohibits any new "grey area" measures by governments. Existing measures must be phased out within a period not exceeding four years. As an exception, each importing member can maintain one specific measure up to 31 December 1999 (article 11).[9] However, the US law (Section 203 of the Trade Act 1974 as amended) only changes all references to "orderly marketing agreements" to the provisions that the President may, for the purpose

of taking safeguard action, "negotiate, conclude, and carry out agreements with foreign countries limiting the export from foreign countries and the import into the United States of such article". As these agreements in substance may fit the description of OMAs (or VERs), this could give rise to problems of interpretation.

23. Article 11.3 of the ASG requires countries neither to encourage nor to support "the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to"... voluntary export restraints, but does not oblige them to take action to eliminate such measures. There is a concern that the phasing-out of the governmental VERs may lead to increased recourse to collusive "industry-to-industry" or private VERs.

24. The ASG establishes (for the first time) a Committee on Safeguards to monitor and review the operation of the Agreement (article 13).

B. Differential and more favourable treatment

25. With regard to developing countries, the Agreement provides the following differential and more favourable treatment:

(i) a safeguard action shall not be imposed against a product from a developing country, if the share of imports of the product in question in the importing developed country does not exceed 3 per cent, provided that developing countries with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product in question (article 9:1). This "threshold clause" has been viewed as a major improvement for developing countries, particularly for those that are small suppliers and new entrants as they will be exempted from safeguard actions when their market shares are less than these thresholds. Thus, it provides them with a degree of predictability and enhanced security of access to the world market. The new EU regulation puts into practice an identical provision to the ASG regarding the circumstances in which developing country members of the WTO may be exempt from safeguard measures. In the case of the United States a reference has been made in the summary section of its Statement of Administrative Action, but not in its implementing legislation;

(ii) developing countries may impose safeguard action for an extra two years (i.e. the duration for measure taken by developing countries could be 10 years while developed countries could impose such measure for 8 years).[10] In the past developing countries have rarely imposed safeguard actions. However, under the new circumstances there may be a need for them to make use of safeguards to protect their domestic industry from injurious imports as a result of the significant reduction and binding of tariffs, import liberalization and the disinvocation of Article XVIII:B. The extended duration for safeguard measures taken by developing countries would certainly give them more time to make the necessary adjustment to foreign competition;

(iii) developing countries may reimpose safeguard actions on the same product after a period equal to half the duration of the previous measure but not less than two years (article 9:2). This would also provide developing countries with more flexibility to reimpose safeguard actions within a shorter period of time than that available to other countries.

C. Imposition of quotas

26. Under article 5.1 of the ASG, a quantitative restriction can still be imposed on the import of a product to the extent necessary to prevent or remedy serious injury and facilitate adjustment, and can be allocated among specific exporting countries. But such a measure shall not reduce the quantity of imports below the average level of imports in the last three representative years for

which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury". While the previous US law did not specify such a period, the new US law provides that "Any action taken under this section proclaiming a quantitative restriction shall permit the importation of a quantity or value of the article which is not less than the average quantity or value of imports of such article enter into the United States in the most recent 3 years that are representative of imports of such article and for which data are available, unless the President finds that the importation of a different quantity or value is clearly justified in order to prevent or remedy the serious injury" (emphasis added). The SAA argues that neither the ASG nor the US amendment requires that the three years be consecutive.[11]

D. "Quota modulation"

27. Notwithstanding its reaffirmation of the MFN principle, the ASG permits "quota modulation": importing countries may selectively target imports from specific countries if imports from these countries have increased disproportionately. As per article 5.2 (b) of the ASG, such an exception could only be granted provided that prior consultations are conducted under the auspices of the WTO Committee on Safeguards and that clear demonstration in provided to the Committee that (i) imports from certain countries have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period, (ii) the reasons for the exception are justified, and (iii) the conditions of such exception are equitable to all suppliers of the product concerned. As such an exception permits countries to deviate from strict MFN treatment by the terms of GATT Article XIII (Non-Discriminatory Administration of Quantitative Restrictions), the "quota modulation" provisions could well lend themselves to abuse. Without close monitoring of the implementing legislation and administrative practice, and effective surveillance by the Committee on Safeguards, to which such measures must be justified, "quota modulation" could become the rule rather than the exception. However, the new EU regulation (article 16 (4) (b)) only partially reproduces the contents (i.e. point (i)) of article 5.2 (b) of the ASG which may lead to different interpretation with regard to the other conditions regarding justification and equitable conditions of the ASG.

28. This provision also seems inherently skewed against new entrants, whose imports are more likely to increase disproportionately. Thus, there is a risk that this provision would provide a mechanism for dealing with increase of competition from new entrants (mainly developing countries and countries in transition) while preserving the market shares of traditional suppliers. The compromise to reaffirm the MFN principle in one article of the Agreement and qualifying it in another, may be open to different interpretations. The effective operation of the Committee on Safeguards will be crucial in this respect.

29. The quota modulation provision could obviate the need for WTO countries to seek to include special provisions ("selective safeguard clauses") within the context of protocols of accession of new WTO member States. For example, the issue of safeguards plays a prominent role in the negotiations for China's resumption of GATT status and has been carried over in the negotiations on China's GATT/WTO membership despite the inclusion of Article 5.2 (b) in the ASG.[12]

E. Alternative rules on safeguards

30. The opportunities presented by the ASG will not apply to all sectors of interest to developing countries. The textiles and clothing sector will continue to be subject to a separate regime, with a built-in selective safeguard mechanism for the 10-year transitional period of its integration into the GATT, although the ASG will apply to those products "integrated" into GATT in the various stages. Much of the agricultural sector will also be subject to a different safeguards regime,[13] which provides for special safeguard actions in the form

of additional duties, calculated on the basis of trigger volumes or trigger prices. This special safeguard will be maintained throughout the duration of the reform process.

F. The problems faced by the "non-market economy" countries

31. Despite the significant progress made in their economic reforms, many countries which are in the process of transition to a market economy are still considered as "non-market economy countries" by major trading nations. They continue to maintain certain discriminatory measures against economies in transition which had been established at the time their prices were set by the state (even though some are WTO members).

32. The trade laws and regulations of some major trading nations have continued to maintain the selective safeguard clauses designed to prevent "imports from non-market economy" countries deemed to be market-disruptive. Under these clauses, safeguard action can be applied to prevent "market disruption", a concept based on the prices[14] of imports as compared to those of domestic producers, against imports from only the country concerned, and not to all other suppliers as required by the ASG and Article XIX of GATT 1994. As the ASG contain no reference to non-market economies, the retention of such selective clauses against WTO members would appear to be illegal.

II. ANTI-DUMPING PRACTICES

A. Overview of the agreement on anti-dumping[15]

33. Before the Uruguay Round there was concern that dumping practices were the subject of the least stringent multilateral disciplines,[16] and that as a result anti-dumping measures were being applied with increasing frequence.[17] The Uruguay Round negotiations on anti-dumping measures were intended to achieve a "deepening" of the multilateral rules and disciplines, to restrain excessive administrative zeal, reduce scope for unilateral interpretations, promote predictability and inspire confidence in the dispute settlement process. These objectives were strengthened by the fact that many developing countries had begun to adopt anti-dumping legislation in the context of their trade policy reforms.[18]

34. The new Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, or simply called the Agreement on Anti-Dumping (AAD) designs clearer and more effective rules and procedures to be applied by the users, attempts to limit the scope for abuse in the application of anti-dumping measures, and seeks to reduce the unfairness and arbitrariness of many aspects of the national regulations and practices of the major users of anti-dumping measures.

35. The AAD improves on vague or imprecise formulations in the Tokyo Round Code[19] and brings about a number of methodological and procedural changes. Amongst the most important are those relating to the clarification of methods to be used in calculating dumping margins. These include the "5 per cent rule" (footnote 2 to paragraph 2.2 of article 2), constructed value and determination of profit for constructed value (article 2.2.2), sales below cost and start-up costs (article 2.2.1), price comparison (article 2.4), price averaging (articles 2.4.2 and 18.3).

36. In determining the margin of dumping, the normal value based on sales in the domestic market is preferred to the other alternatives (which entail complicated calculations and may lead to high normal values). Before the entry into force of the WTO Agreement, the importing countries used different bases to calculate the 5 per cent threshold for assessing whether sales in the domestic markets are sufficient for determining normal value. The AAD sets up a predictable and transparent criterion on the '5 per cent representative test'. Domestic sales will normally be considered as not allowing for a proper

comparison if their volume is less than 5 per cent of the export quantity to the importing country concerned. The '5 per cent rule' is an improvement over the Tokyo Round Code and has harmonized the previous practices. While the '5 per cent rule' codifies the EU's previous practice, the new EU Regulation (article 2.2) goes further in favour of the exporters and expressly permits the normal value to be computed on the basis of domestic sales even if they do not meet the '5 per cent rule' provided that the prices charged are considered representative for the market concerned. The United States modified its prior law under which the volume of home market sales was compared to the volume of sales to countries other than the United States, and applies the '5 per cent rule' in conformity with the provisions of the AAD. While the new law will consider both volume and value, the US SAA advises that the '5 per cent rule' will continue to be applied usually on a quantity basis. Only when quantity is not a reliable indicator, such as when the merchandise under investigation consists of both finished products and parts, will value be used. The viability of the home market will be assessed on all sales subject to investigation.[20]

37. The AAD also provides clearer rules governing investigation procedures aimed at reducing the scope for the unjustified initiation of such procedures being used to "harass" trade. Important aspects in this regard are the standing or the threshold for determining whether a "major proportion" of the industry supports an anti-dumping complaint (article 5.4), de minimis and negligible rules (article 5.8), strict time limits (article 5.10), refunds of anti-dumping duties (9.3), sampling (6.10) and new entrants (9.5).

38. The Tokyo Round Code provided that an anti-dumping investigation should be initiated by the filing of a petition "on behalf of the domestic industry". This was interpreted as referring to the domestic producers of the like products as a whole or to those of them whose collective output constitutes "a major proportion" of the total domestic production. However, the expression "a major proportion" was never defined. This gave rise to disputes[21] whether applications for anti-dumping investigations were representative and could hence provide a valid base for initiating investigations. The AAD (article 5.4) provides that the investigation authorities must determine "the degree of support for and opposition to, "an application", and that "the application shall be considered to have been made "by and on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry." The United States law incorporates the AAD provision in full detail. The new EU Regulation also reproduces the AAD provision on standing which require complainants to demonstrate and the authorities to determine prior to the initiation that the complaint is supported by a major proportion of the Community industry. This new rule is a welcome clarification of the term "major proportion" of domestic industry and may benefit many exporters, including developing countries. However, it should be noted that producers which are "related" to the exporters and importers are excluded from the calculation. This may to a certain extent detract from the expected benefits of this provision, as the process of globalization advances more firms will be involved in both domestic and foreign production of the same product.

39. The de minimis and negligibility rules (Article 5.8), may exempt many small exporters, particularly those from developing countries from anti-dumping actions. As a major improvement of the standard for de minimis margins, the AAD provides that the anti-dumping duties shall not be imposed, if the dumping margin is less than 2 per cent, expressed as a percentage of the export price. The new EU Regulation has brought its previous practice of 1.5 per cent de minimis dumping margins in line with the AAD provisions and set forth that the investigation proceedings shall be terminated if the dumping margin is below 2 per cent for individual exporters. But, they shall remain subject to the

proceedings and may be reinvestigated in any subsequent review carried out for the country concerned.[22] The United States have changed the de minimis dumping margins (both for preliminary and final determinations) from the previous 0.5 per cent to 2 per cent as required by the AAD. However, the United States will implement the new, higher de minimis standard only in original investigations, not in review.[23] Canada has implemented the AAD provisions on de minimis dumping margins.

40. The AAD includes a negligible import share provision whereby no injury would normally be found if imports from a particular country account for less than 3 per cent of imports of the like product in the importing country, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing country collectively account for more than 7 per cent of imports of the like product in the importing country. Both provisions of de minimis margins and negligible import shares would have led to the avoidance of an important number of anti-dumping duties against developing countries had they already been in force during 1993-1994.

41. The United States law incorporates the AAD provision in this respect. However, the new EU Regulation (article 5.7) has adopted a different approach by using a market-share test instead of the import-share test. Under the EU market-share test, no proceeding shall be initiated against countries whose volume of imports represents a market share of below 1 per cent of Community consumption, unless such countries with a market share of below 1 per cent collectively account for 3 per cent or more of Community consumption.[24] Although the import-share test may not be an ideal approach,[25] the impact of the market-share test on exporters may differ from case to case;[26] Canada has introduced the AAD provisions on negligible import share, which should have a favourable impact on the CITT's consideration of exclusions of small supplying countries.

42. Furthermore, the implementing legislation of the EU, Canada and the United States has harmonized practices in conformity with the AAD in a number of aspects including, in particular: sales below cost, start-up costs, determination of selling, general and administrative expenses (SGA) and profit in constructed normal value, price comparison, price averaging and determination of injury. In some cases, the national implementing legislation has been amended to reflect the provisions of the AAD which would give more clarity and predictability to foreign exporters as to how the rules would be applied. For example, the United States incorporates the provision of the AAD[27] requiring the appropriate adjustment for exchange rate fluctuations.[28] The EU, Canada and the United States have made significant improvements in their anti-dumping rules and procedures. For example, the provisions concerning verification visits, best information available (BIA), sampling and refund of excess duties paid could be considered as possible practical benefits to investigated parties, particularly small firms (both exporting and importing) in the sense that these provisions: (i) aim at alleviating the practical burdens on the investigated parties and controlling arbitrary or capricious rejection of information submitted by them; (ii) strive to balance the interests of exporters, importers, domestic producers in importing countries and investigation authorities for both expeditious conclusion of investigations and reasons of administrative convenience; and (iii) address the problem of delays in reimbursement of excess duties paid by setting up time-limits.

43. The "Newcomer" clause (Article 9:9.5) is intended to correct the unfair situation arising from the practice in some countries of applying "residual" anti-dumping duties to exporters or producers which had not exported during the original period of investigation. The practice of newcomer reviews had been introduced by the EC in 1989. Article 11.4 of the new EU Regulation introduced the following changes in line with the AAD: (i) such reviews can only be initiated where a newcomer has actually exported to the EU following the investigation period in the initial case or where it has entered into an irrevocable contractual obligation to export a significant quantity to the EU; and (ii) once such a review starts, the duty applicable to the newcomer will be

repealed but its exports will be subject to registration in order to ensure that, should the view result in a dumping determination, anti-dumping duties can be levied retroactively to the date of initiation of the review.

44. Under the previous U.S. practice, anti-dumping duty measures were applied on a country-wide basis. Thus, except for merchandise from exporting firms that the Commerce Department determined to be selling at non-dumped prices, all merchandise from a country covered by a measure was subject to potential liability for anti-dumping duties, including those exported by newcomers. The new provisions of the URAA also incorporate the AAD provisions and further require the Commerce Department to initiate accelerated administrative reviews of newcomers if requested. This has certainly improved the access conditions of many new exporters and producers in developing countries to the US market, when the like products exported by other firms from their country are subject to US anti-dumping orders.

45. The AAD also introduces a "sunset" clause (articles 11.3 and 18.3.2) to review anti-dumping measures within five-year intervals. Under the sunset clause, anti-dumping duties will automatically cease effect after five years from their imposition unless the investigating authorities have conducted reviews and determined that termination was likely to lead to continuation or recurrence of dumping and injury. Article 9 of the Tokyo Round Code had simply specified that anti-dumping duties "shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury".[29] Thus, anti-dumping measures could last indefinitely. Article 9.5 of the AAD now codifies the EU's and Canada's practices for termination of anti-dumping measures. As a result of the AAD, a review provision has been introduced into the US law to implement the AAD requirements, which also includes "transition" rules for measures in effect before the entry into force of the WTO Agreement with respect to the U.S. However, the SAA makes clear that the USITC must engage in the counter-factual analysis of whether there is injury. Therefore, the review requirements are not likely to terminate all on many of the existing anti-dumping measures.[30]

46. In order to adapt its previous system to the AAD in this regard, the new EU Regulation (article 11.2) requires that: (i) the notice of impending expiry will have to be published in the fourth year of application of the measure. The EU producers will be entitled to lodge a review application no later than three months before the end of 5-year period following the imposition of measures. If no expiry review is initiated, the measures will automatically lapse; and (ii) the test to be applied to determine whether measures should remain in force is whether the removal of the measures would be likely to result in a continuation or recurrence of dumping and injury. It also sets out clear conditions as to the likelihood of dumping. However, while the AAD refers to "domestic industry", the new EU regulation only refers to "Community producers". It is clear from the AAD that an application for expiry review can only be filed by domestic industry who meet the standing requirements laid down by the AAD; the wording of the new EU Regulation may allow the submission of such applications by "Community producers" who may not meet the standing requirements. Furthermore, the new EU Regulation (article 11.6) provides that "where measures are repealed for individual exporters, but not for the country as a whole, such exporters shall remain subject to the proceedings and may, automatically, be reinvestigated in any subsequent review carried out for that country". The word "automatically" used in the new EU Regulation may lead to problems of interpretation as the AAD requires that no investigation may be carried out without sufficient prior evidence of dumping and injury.

47. Canada has a review clause since 1984 which is consistent with the provisions of the AAD and thus, no change in practice is required.

48. Attempts to control some other controversial national anti-dumping practices have succeeded to a certain extent by codifying them into the AAD at the highest standard of the major users. This includes acceptance of the EU practice for calculation of the normal value for sales below production costs.

The price adjustments for differences in quantities and level of trade, which had been abolished in 1988, were reintroduced along the line of EU practice. "Cumulative injury assessment", which had been the subject of complaints by developing countries, however, has at least been subject to clearer disciplines.

B. Differential and more favourable treatment

49. The AAD provision (article 15) regarding developing countries, simply repeats the Tokyo Round Code language by recognizing that "special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members". Since this is, as was the case before, only an "endeavour" and non-binding, only practice will indicate whether it is meaningful to developing countries. There is a risk that it might lead to increased pressures to enter into "price undertakings".

50. Although important improvements have been made in the AAD and many of these improvements, as discussed above, have been incorporated into the national legislation of the major users, there are still some issues and areas that cause concerns for many developing countries. For example, the United States law only applies the price averaging practice to original investigations, but not in reviews;[31] allows cross cumulation of the effect of subsidized imports and dumped imports in the determination of injury;[32] and excludes captive production in the determination of the domestic production.[33] In some cases additional elements have been introduced which may cause problems of application in the future. For example, in determining SGA and profit in constructed normal value, the new EU Regulation differs from the AAD provisions by referring to the profit "determined" by the authorities for such other exporters, i.e. presumably on the basis of profitable and viable domestic sales only. Price comparisons with third country producers are still maintained even for WTO countries in cases where there are no domestic sales. The calculation of the normal price for producers/exporters which do not cooperate in the investigations is left to substantial discretion. As illustrated by past experience, this may lead to artificially high profit margins.[34] In price comparisons the new EU Regulation requires the exporter to demonstrate a pattern of "consistent and distinct differences in functions and prices of the seller for different levels of trade in the domestic market of the exporting countries".[35]

C. Anti-circumvention

51. The AAD did not incorporate provisions for dealing with the "circumvention" of anti-dumping measures which had been an important issue in the negotiations. Instead, the WTO Committee on Anti-Dumping Practices has been charged to undertake continuous study of the issue.[36] Though the AAD (article 18.1) permits the imposition of anti-dumping duties only in accordance with the provisions of the AAD, provisions to address circumvention of anti-dumping measures exist in several national laws.[37] The Decision on Anti-Circumvention recognizes that this matter was addressed unsuccessfully in the Uruguay Round as well as the desirability of the applicability of uniform rules in this areas as soon as possible.

52. The anti-circumvention provisions are linked to the globalization process, which make it more difficult to determine the geographical "origin" of a product. The anti-circumvention measures are directed against foreign firms established in the importing country which assemble from imported parts the product which would otherwise be subject to anti-dumping duties. This may illustrate a more fundamental problem: many of the concepts which are underlying the trade policy measures dealt with in the Multilateral Trade Agreements derive from the erroneous assumption that "production" is an activity that takes place within national frontiers. These contradictions between traditional trade policy concepts and mechanisms and the current realities may call for a reexamination

of many of these instruments as to their pertinence in a world of globalized production.

D. Anti-dumping measures and competition policy

53. This same line of thought has led to suggestions that anti-dumping should be placed into a competition policy framework and replaced by competition laws suitably amended to reach alleged foreign predators. One of the main arguments in this direction is that there is no justification to maintain different standards for measuring price discrimination in international trade and domestic commerce. These suggestions claim that: (i) predatory pricing in international trade practices rarely occurs; when supply is available from many sources, national and foreign, the elimination of competition is unlikely; (ii) aggressive pricing without predatory intent is recognized as vigorous competition and should be encouraged in the interests of consumers and efficient allocation of resources. A recent US International Trade Commission (USITC) study "conservatively estimated that the United States economy would have experienced a net welfare gain of US $1.59 billion in the year 1991 alone, had outstanding US Ad/CVD orders not been in effect." "In other words, the study showed that in 1991, outstanding AD/CVD orders imposed costs on consumers, downstream industries, and the economy as a whole of at least US $1.59 billion greater than the benefits enjoyed by successful petitioning industries and their employees";[38] (iii) national anti-dumping rules now often operate as a legal basis for discriminatory import relief measures which distort competition and trade by creating incentives for collusive action, particularly in the context of price undertakings. The protective impact of anti-dumping action extends beyond the relatively small amount of trade actually subject to anti-dumping duties. As anti-dumping decisions have the force of legal precedents they can have important effects on business decisions; decisions as to what is liable for anti-dumping (or countervailing) action must be taken into account by firms outside the industry directly affected. New entrants, usually developing countries or countries in transition, which are obliged to offer their products at lower prices than the established competitors are likely to become the major targets of anti-dumping measures in future.

E. "Non-market economy" countries

54. The implementing legislation of both the EU and the United States contain specific provisions with regard to products imported from non-market economy countries.[39] Article 2.7 of the AAD[40] (which applies to countries which maintain " a complete or substantially complete monopoly of trade and where all domestic prices are fixed by the state") is the only reference in this regard. These specific provisions, in practice, would allow the EU and the US investigation authorities to continue to ignore the domestic costs and prices of the so-called "non-market economy" country producers in determining the normal value against which the export price is compared, and to determine the normal value of these countries' exports on the basis of domestic prices or cost prevailing in a "surrogate" market economy country. This practice almost invariably leads to high dumping margins for the exports of the countries concerned. It is not clear which countries will be affected by these provisions. Usually, countries that are deemed as "non-market economy" are designated by the importing countries with their own definition. This may include in certain cases both WTO members and non-members.[41]

55. As a result of the significant progress made in their economic reforms, many countries in the process of transition from a centrally-planned to a market-oriented economy should be able to make a convincing case that they are not covered by Article 2.7 and that as members of WTO, such discriminatory anti-dumping measures cannot be applied against them. The possibility that some WTO members may seek to include reference to Article 2:7 of the AAD (or the second Supplementary Provisions to Article VI:1 in Annex 1 to GATT 1994) in future protocols of accession of countries in transition would seem a matter for concern.

III. COUNTERVAILING MEASURES

A. Overview of the agreement on subsidies and countervailing measures[42]

56. Subsidies have been one of the main causes of trade tensions and disputes. This was mainly because no international consensus existed as to the appropriate role of Governments in supporting production and trade. The subsidies portion of the ASCVM has made an important improvement over its predecessor as subsidies have been clearly defined and the "injury test" will be applied to all WTO members.[43] For the first time, the ASCVM defines what constitutes a subsidy as involving "a financial contribution by a Government or any public body" and a benefit which is thereby conferred. The financial contribution may involve a direct transfer of funds, potential direct transfers (such as loan guarantees), the foregoing of revenue by the Government, or the public provision of goods or services, other than infrastructure, or the government purchase of goods; or any form of income or price support. The ASCVM also establishes the legality of subsidies, identifying those which are: (i) **prohibited:** subsidies contingent on export performance or on using domestic inputs rather than imports; (ii) **actionable:** subsidies that cause adverse effects to the interests of other members, for example, injury to the domestic industry of another member; and (iii) **non-actionable:** subsidies which are not exposed to the possibility of remedial action.

57. "Specificity", a concept derived from United States practice, is a central feature of the ASCVM. Remedies provided against "prohibited" or "actionable" subsidies can only be applied if a subsidy is "specific" to an enterprise or industry or group of enterprises or industries.[44] Subsidies which are not "specific" (i.e. where access is generally available or granted on the basis of objective criteria or conditions, and not limited to certain enterprises or industries) are not actionable unless it can be demonstrated that they are specific in practice.In addition, three categories of specific subsidies are non-actionable (assistance to research activities, to disadvantageous regions within countries, and for adaptation to meet environmental regulations); such programmes must be notified to the Committee on Subsidies and Countervailing Measures; if not, they lose their non-actionable" status and are exposed to possible countervailing duties. The provisions on non-actionable subsidies run for five years only, and are to be reviewed six months before the end of that period.[45]

58. Other subsidies are "actionable", either through countervailing duties, if they cause material injury to domestic producers, or other remedial action, if they nullify GATT benefits of tariff concessions, or if they cause serious prejudice to interests of other members by displacing or impeding imports into the national market or displacing exports to third-country market. There are clearer rules for recourse against actionable or prohibited subsidies. For instance, some subsidies are deemed *prima facie* to cause serious prejudice to other countries' trade interests, including those where ad valorem subsidization exceeds 5 per cent, and those aimed at covering operating losses of enterprises or the direct forgiveness of debt. The thrust of these provisions is to provide countries with effective recourse against subsidies which displace their exports in third country markets.

59. The ASCVM also provides detailed rules governing the initiation of countervailing duty investigations, an improved causal link between subsidization and injury, as well as a "sunset clause" provision. This clause calls for the removal of countervailing duties maintained for lengthy periods. Such provisions are aimed at reducing the scope for countervailing duties as a "trade remedy" device to harass imports. However, the ASCVM codifies the practice of cumulation of injury (a matter of particular concern to developing countries) which facilitates injury finding in investigations involving several countries, including small suppliers.

60. The ASCVM creates trade opportunities for developing countries to the

extent that it enables them to defend more effectively their interests against subsidized competition in third country markets, and reduces the possibility of their exports being subject to countervailing duties, or other "remedial" action. These advantages derive from : (1) the introduction of an internationally agreed definition of subsidy. The ability of members to unilaterally define a countervailable subsidy are limited; (2) the creation of a category of subsidies which are exempt from the application of countervailing duties, provided that certain criteria are met; (3) the de minimis rule relating to the amount of a subsidy, which should exempt many domestic programs and practices from the imposition of countervailing duties. The exemption does not preclude challenging and investigating these subsidies; (4) provisions have been introduced to discipline third country subsidization.

B. Differential and more favourable treatment

61. The ASCVM Agreement also contains what are perhaps the most straightforward and applicable provisions for differential and more favourable treatment in favour of developing countries of any of the Multilateral Trade Agreements.These include:[46] (i) an exemption from the prohibition on export subsidies applies to least developed countries and to a specific list of developing countries, which will benefit from these exceptions so long as their per capita income remains at less than $1,000 per annum (the so-called "Annex VII countries").[47] Other developing countries are to phase out their export subsidies over an eight-year period (article 27:2); (ii) developing countries are exempted for five years from the obligation not to grant subsidies contingent on the use of domestic goods and eight years for least developed countries (article 27.3); (iii) if a developing country becomes "competitive" in a given product, defined as reaching 3.25 per cent of world trade in the product for two consecutive years, it must eliminate export subsidies on that product over two years (for Annex VII countries the period is eight years) (article 27:6); (iv) developing countries' export subsidies are not actionable during the transition period unless they cause injury; they may not be presumed to cause serious prejudice (article 27:7 and 8); and (v) remedies with regard to actionable subsidies can only be authorized if the subsidy impedes or displaces imports in the subsidizing country or if subsidized exports cause injury to domestic firms in the importing market (article 27:9).

62. Developing countries should also benefit from the following de minimis thresholds which provide that countervailing duty investigations should be terminated: (i) if the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing country, unless imports from developing country members whose individual share of total imports represent less then 4 per cent collectively account for more than 9 per cent of the total imports of the like products in the importing member; or (ii) if it is determined that the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis. For Annex VII developing countries the level is 3 per cent, but it expires after eight years from the date of entry into force of the WTO Agreement.

63. The ASCVM also contains provisions which recognize the importance of subsidies in the transition process to a market-based economy, providing countries in transition with important exceptions from the prohibition on export subsidies for a seven-year period, which can be extended.

64. The de minimis and negligible thresholds have been viewed as important improvements of the ASCVM. For many countries, particularly developing countries the de minimis thresholds relating to the value of a subsidy should exempt many of their domestic programs and practices from the imposition of countervailing duties.

65. The new EU Regulation[48] reproduced the ASCVM de minimis provisions for thresholds that apply to developed countries, i.e. proceedings where the amount of countervailable subsidies is less than 1 per cent expressed as a percentage

of the export price are in principle immediately terminated. The new EU Regulation also provides for the special de minimis thresholds relating to the value of subsidies for developing countries as follows: (i) the general threshold for developing countries is a subsidy amount which does not exceed 2 per cent expressed as a percentage of the export price; and (ii) a special threshold of 3 per cent applies to developing countries members of the WTO referred to in Annex VII of the ASCVM as well as - subject to certain conditions defined in the Regulation (article 3 (4)) - to developing countries members of the WTO which are not listed in that Annex but which have completely eliminated export subsidies contingent upon export performance. However, the Regulation further sets forth that "it is only the investigation that shall be terminated where the amount of the countervailable subsidies is below the relevant de minimis level (i.e. 2 per cent for developing countries, 3 per cent Annex VII developing countries and 1 per cent for all other countries) for individual exporters and they shall remain subject to the proceedings and may be re-investigated in any subsequent review carried out for the country concerned".

66. The United States law also reflects these thresholds. As required by the ASCVM provisions, it provides that Commerce Department shall disregard as de minimis net countervailable subsidies determined to be less than 1 per cent ad valorem in the case of imports from developed countries as per article 11.9 of the ASCVM. In accordance with article 27.10 (a) of the ASCVM, in case of imports from developing countries, it provides that subsidies determined not to exceed 2 per cent ad valorem are de minimis.[49] The U.S. legislation, in accordance with article 27.11 of the ASCVM, also provides that in case of imports from certain developing countries subsidies not in excess of 3 per cent shall be regarded as de minimis. Two categories of developing countries are eligible for this special de minimis threshold. The first category consists of the countries listed in Annex VII of the ASCVM. For them, this special de minimis threshold will exist for eight years after the date of the WTO Agreement enters into force. The second category consists of developing countries that, according to a notice from USTR to Commerce Department, have eliminated their export subsidies on an expedited basis pursuant to article 27.11 of the ASCVM. The extension of a higher de minimis threshold to this second category of countries provides an incentive for them to eliminate their export subsidies expeditiously. Accordingly, for these countries this special de minimis standard will exist for not more than eight years after entry into force of the WTO Agreement, but only for so long as they continue not to grant any export subsidies. However, in both instances, under Article XIV:2 of the Marrakesh Agreement Establishing the WTO, the eight-year period runs from the date the WTO Agreement enters into force, not from the date any particular country becomes a WTO member. It should also be noted that under Section 705 (a) (3) of the U.S. Tariff Act of 1930 these thresholds are not applicable to review of CVD orders, but only to initial CVD investigations.

67. The new EU Regulation reproduced the ASCVM provisions on negligible volumes of subsidized imports from developing countries which requires that any countervailing duty investigations concerning imports from them "shall be considered negligible if it represents less than 4 per cent of the total imports of the like product in the Community, unless imports from developing countries whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the Community".

68. With respect to the above mentioned de minimis thresholds, Section 267 of the U.S. URAA provides guidance for designating both least developed and developing countries in line with the relevant provisions of the ASCVM (articles 27 and Annex VII).

69. As Under the ASCVM, all WTO members are entitled to an injury test in countervailing duty investigations under the URAA.[50]

70. The legislations of the EU, Canada and the United States also reflect the other ASCVM provisions on countervailing duty investigations such as standing,

sunset, etc. along the same lines as those applied to anti-dumping measures.

71. Anti-circumvention measures are also applied to subsidized imports.[51] It appears that a consensus on how to deal with this issue will be first sought in the context of anti-dumping as indicated above.

IV. DEVELOPING COUNTRIES AND THE CONTINGENT PROTECTION AGREEMENTS

72. With the significant reduction and elimination of tariffs and non-tariff measures by both developed and developing countries and the gradual returning of the textiles, clothing, and agricultural sectors into the multilateral trading system, the new rules deriving from the Uruguay Round, particularly those agreements on safeguards, anti-dumping and subsidies and countervailing measures, have become the main provision under which trade restrictive action can be applied to the exports. On the other hand, many developing countries have introduced anti-dumping, countervailing duty and emergency safeguard legislation and can be expected to apply such measures more frequently in the future.

A. Benefits for developing countries

73. As the trade of the developing countries has increased in recent years, their exports have been more frequently faced with contingent trade protection actions, mainly anti-dumping and countervailing measures (see Tables 1 and 2). For example, during the period 1 January 1993 to 31 December 1994, the proportion of investigations involving non-OECD exporters was almost 57 per cent and 86 per cent respectively for the United States and the EU.

74. The small and medium size firms in developing countries have difficulty in defending their interests because of the complexities of the system and the cost of compliance in investigation proceedings. The assistance that the governments of developing countries can provide to their exporting firms in defending their cases in the investigation processes in the importing countries is often very limited. As a result, the percentage of cases with restrictive final outcomes are usually higher for imports from developing countries than from developed countries. For example, as shown in Table 2, during the period of July 1991 - June 1993 in the U.S. market Brazil, and to a lesser extent the Republic of Korea, central and eastern European countries, the EC and China faced the largest number of cases in relation to the share of U.S. imports. Japan and Canada each recorded a share of investigations considerably lower than their share of U.S. imports. The share of cases resulting in restrictive final outcomes was higher for developing countries than for developed countries, and highest for China and Taiwan province of China; it was low in the case of Japan. The share of their exports to the United States covered by investigations in fiscal year 1992 was highest for the Republic of Korea and Brazil.

75. Rules governing contingent protection actions are the most complex part of the multilateral trading system. They involve investigatory procedures, administrative and judicial practices, review procedures of the importing countries and eventual recourse to the WTO dispute settlement mechanism. The efforts to establish greater precision and predictability in the rules with a view to facilitating trade has also had the result of increasing their complexity. In particular, the rules under the AAD and the ASCVM including their national implementing legislation have become highly structured, and burdensome in terms of administrative actions and cost.

76. In general, the increasing degree of complexity in AD/CVD procedures weighs disproportionately against developing countries and their small firms with relatively less developed administration, incomplete knowledge of laws, regulations and administrative practices of the importing countries, less expertise in dealing with the dumping and subsidizing allegations. This creates particular problems for them in effectively defending their rights and interests in the context of these agreements and the relevant legislation of importing countries. One example is timing: under the AAD exporters or foreign producers

usually have 30 days from the date of receipt of the questionnaire to submit their responses that are essential in an anti-dumping investigation and form the basis on which the dumping determination will be made. Consequently, exporting firms and countries which can respond more quickly to deal with the technically sophisticated arguments required have a distinct advantage. Frequently, developing country exporting firms and developing exporting countries are not prepared for quick reaction; nor do they have the capability to exploit existing opportunities fully (including the role of intermediaries - law firms in the importing countries).

77. As new entrants to markets, developing country firms are often required to offer competitive prices,[52] thus attracting the attention of the competing domestic industry of the importing countries, suddenly facing low-priced developing country competition. Thus imports from developing countries are more easily perceived as "injurious" to the market than those with established market positions. This situation would presumably provoke requests for the application of the "quota modulation" provisions of the ASG. It could also lead to the initiation of AD/CVD cases resulting in the imposition of duties or the negotiation of price undertakings, which can set precedents which have to be taken into account by exporters even if they are not trading in the sector directly concerned. Even if the cases are eventually dismissed, the mere initiation of these actions can deter trade and incur the costs and distraction of the procedure itself.

78. The complex proceedings, the lack of information networks, imperfections of their accounting system, the shortage of the personnel and expertise required, the unfamiliarity with AD/CVD procedures of the major importing countries, etc., have put many developing countries in a disadvantageous position to conduct a reasonable and effective defence. Some exporters from developing countries are persuaded to withdraw from markets without having effectively defended their interests and made full use of their rights under the multilateral trade agreements as well as under domestic legislation.

79. Due to the complexity involved, AD/CVD proceedings in developed importing countries are extremely expensive. For example, in Canada and the United States, it is not unusual for exporters to incur defence costs well in excess of US$ 500,000 or US$ 1 million to defend their interests. At such cost small exporting firms in developing countries are hardly able to take advantage of the procedural and substantive rights theoretically available to them.

B. Implementation by developing countries

80. The rapid opening of developing countries' markets has resulted in the governments of these countries being under increased pressure to protect domestic industry against injury from imports by using GATT/WTO consistent measures, such as anti-dumping and countervailing measures and emergency safeguard action.[53] However, anti-dumping and countervailing measures in particular, require substantial financial and human resources to carry out the detailed investigations, particularly those which must be carried out in the exporting countries in accordance with the multilateral trade Agreements. The administrative agencies of some of the developing countries that are new users of these tools have neither the personnel nor the expertise, nor the financial resources required to conduct such detailed investigations. Their inability to observe basic procedural requirements might expose them to successful challenges under the WTO dispute settlement mechanism. Modern anti-dumping and countervailing regimes require highly trained human resources to cope with different languages, accounting systems and business practices. Investigation skills and techniques are unique - closely akin to those required of commercial fraud investigators. The problem of lack of personnel and expertise in many developing countries could not be tackled without support and assistance from the international community.

81. National laws and regulations of most developing countries, even where

existing, are still imperfect. They are usually less detailed than the multilateral agreements, whereas on the contrary the national laws and regulations of the major developed countries are far more detailed than the multilateral agreements. Developing countries will need to modernize their national laws and regulations, and the techniques for containing unfair import competition.

82. They need to bring them fully into line with the Uruguay Round agreements and to integrate them with the rest of their legal system to avoid that their anti-dumping and countervailing measures could easily be challenged by other WTO members. This implies to develop a new administrative culture and expertise: For example, the independence of the relevant tribunals must be ensured, and a nucleus of legal experts and economic consultants conversant in trade law will have to evolve.

83. If developing countries are to introduce effective legislation and procedures, and operate them effectively in the short term, they will require technical assistance in learning the skills and methodology to be followed. An urgent priority will be technical assistance in the development of investigators handbooks and manuals. In addition, training facilities in academic and research institutions should be strengthened and oriented to the needs of the private sector. Given their current level of development and financial situation, for many developing countries this could not be achieved without support and assistance from the international community.

V. PROBLEMS OF NON-WTO MEMBER COUNTRIES

84. Although the Uruguay Round Agreements have provided multilateral rules and disciplines of greater stringency, many of these agreements and the relevant implementing legislation of the major trading nations have limited these benefits only to the WTO members. This would put those developing countries and countries in transition which currently are not members of the WTO in a disadvantaged situation and pose new challenges to policy makers in these countries.

85. The ASG has clarified and reinforced the disciplines for the application of safeguard measures by WTO members against imports from each other. It also prohibits grey-area measures and calls for the phasing-out of the existing grey-area measure within a period of four years with one exception for each importing member. However, new VERs and quantitative restrictions can be imposed against non-WTO member countries and the existing VERs can be maintained. Furthermore, the injury test in countervailing duty investigations will not necessarily be applied to products imported from non-WTO member countries. The non-members of the WTO will not be protected by the improved procedures of the AAD, in particular regarding consultations and dispute settlement in a case of anti-dumping, safeguards or countervailing duties imposed by their trading partners.

Endnotes

1. This report should be read against the background of TDR/14/Supplement, pp. 17-27 and 41-106.

2. See TD/B/WG.8/2 and Add.1; UNCTAD/ITD/16 on agriculture; and UNCTAD/ITD/17 on textiles and clothing.

3. See Conference Resolution 159(VI).

4. There are numerous amendments to reflect changes in terminology which have no practical impact on trade or the effectiveness of the legislation.

5. For example, in Canada there have been few AD cases and one CVD action. There have been more AD/CVD actions in the USA but they are not a point where they can be analyzed. There have been no safeguard actions or petitions in either country.

6. For details of the Agreement on Safeguards and its background see Chapter II, The Outcome of the Uruguay Round: An Initial Assessment, Supporting Papers to the Trade and Development Report, 1994, pp.41-64.

7. In order to implement the ASG, a new EU Regulation on safeguard measures (Council Regulation (EC) No. 3285/94) was adopted on 22 December 1994. The laws and regulations that govern the imposition of safeguard measures under the ASG in Canada are contained in the original statue and subsequent amendments of the Canadian International Trade Tribunal Act, the Customs Tariff Act, the Export and Import Permits Act, the Canadian International Trade Tribunal Regulations and Canadian International Trade Tribunal Rules. The United States implementing legislation with regard to the ASG is contained in Title III, Subtitle A of the Uruguay Round Agreement Act (URAA) which amends Sections 201-204 of the US Trade Act of 1974 and Section 330 (d) of the US Tariff Act of 1930. Accompanying it is an extensive and authoritative Statement of Administrative Action (SAA). In addition, it should be noted that Canada and the United States (together with Mexico) within the context of NAFTA maintain preferential safeguards regimes with respect to each other's trade, provided certain tests are met. "Special" safeguard clauses or provisions can also be found in the European Union's preferential trade agreements, such as in its agreements with the Europe Agreement countries, with the Baltic and Mediterranean countries.

8. Through use of the modifier "significant", borrows from the previous U.S. law, which uses the same term in connection with the three economic factors set out in the previous law of the USITC to consider.

9. Under article 12.7, countries are required to notify to the WTO Committee on Safeguards of the grey area measures that maintained by them existing on the date of entry into force of the WTO Agreement. So far, the EU and the Republic of Korea have notified the measures that maintained by them and the timetable for the termination of these measures. The United States and Canada have notified that they had not maintained any such measures. For details see WTO documents G/SG/N/2/EEC and G/SG/N/3/EEC of 24 March 1995, G/SG/N/5/EEC of 18 July 1995, G/SG/N/2/KOR of 27 March 1995, G/SG/N/5/KOR of 15 August 1995, G/SG/N/3/USA of 23 March 1995 and G/SG/N/3/CAN.

10. For details of the information on invocation of safeguards by developing countries see the Outcome of the Uruguay Round: An Initial Assessment, Supporting Papers to the Trade and Development Report, 1994, p.59.

11. See pp. 962-3 of the US URAA.

12. Roderick Abbott, Interrelated Issues, in The New World Trading System: Readings, OECD, Paris, 1994, p. 126.

13. In other words, for those tariff items where "tariffication" has been applied and which have been specifically indicated in the Schedules as subject to this provision.

14. See TDR/14 Supplement, Box 9, pp. 52-53.

15. For details of the Agreement on Anti-Dumping and its background see Chapter III, The Outcome of the Uruguay Round: An Initial Assessment, Supporting Papers to the Trade and Development Report, 1994, pp. 65-88.

16. For example, anti-dumping investigations were often started based on insufficient evidence, and anti-dumping duties might be retained long after the conditions for their levy had been eliminated.

17. In the period 1989-1993, the number of anti-dumping actions initiated almost tripled.

18. See, Jeffrey E. Garten, former Under Secretary of U.S. Commerce for International Trade, New Challenges in the World Economy, the Antidumping Law and U.S. Trade Policy, Remarks made before the U.S. Chamber of Commerce, Washington, D.C., on 7 April 1994, World Competition, Vol. 17 No.4, June 1994, p. 150.

19. Negotiations on anti-dumping measures in the Uruguay Round was the third attempt to clarify the GATT rules in this area. The first Anti-Dumping Code was negotiated in the Kennedy Round, and the second in the Tokyo Round.

20. See the United States "Uruguay Round Agreement Act, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required supporting Statements", 103rd Congress, 2nd Session, House Document 103-316, Vol. 1, U.S. Government Printing Office, Washington: 1994, pp. 821-822.

The EU implementing legislation with regard to the AAD is the new EU Regulation No. 3283/94 which amends its previous Regulation No. 2423/88, however, the EU will shortly be publishing a new corrected version of the Anti-Dumping and Anti-Subsidy Regulations. Canadian legislation governing the implementation and administration of AD/CVD measures under the AAD and the ASCVM in Canada are contained in the Special Import Measures Act (SIMA) and the relevant provisions of the Canadian International Trade Tribunal Act (CITT Act) as amended by the WTO Act of Canada. The United States implementing legislation concerning the AAD and the ASCVM is Title VII of the Tariff Act of 1930 as amended by Title II of the URAA.

21. See GATT, report of the Panel, Committee on Anti-Dumping Practices, United States: Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products From Sweden, ADP/47, 20 August 1990.

22. Some have viewed that the new EU test differs from the AAD requirement and could be challenged. For details see, Edwin Vermulst and Paul Waer, the Post-Uruguay Round EC Anti-Dumping Regulation - After a Pit Stop, Back in the Race, Journal of World Trade, Vol. 29 No.2, April 1995, pp.63-64.

23. The SAA, echoing the argument made on price comparison, states that Commerce Department will continue to apply the 0.5 per cent de minimis standard for purposes of waiving the collection estimated duty deposits in review. See, the United States "Uruguay Round Agreement Act, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and

Required supporting Statements", 103rd Congress, 2nd Session, House Document 103-316, Vol. 1, U.S. Government Printing Office, Washington: 1994, pp. 844-845.

24. This differs from the previous EU practice under which there was an informal rule of thumb that proceedings would normally not be initiated with respect to imports accounting for less than 5 per cent of the EU market. There is also a clear line of precedents under which countries with a share of the EU market of less than 1.5 per cent were "decumulated" from other exporting countries and benefit from a no-injury finding.

25. For criticism of the import-share test, see Paul Waer and Edwin Vermulst, EC Anti-Dumping Law and Practice after the Uruguay Round - A New Lease of Life? Journal of World Trade, Vol.28 NO.2, April 1994, pp.15-16.

26. See Edwin Vermulst and Paul Waer, the Post-Uruguay Round EC Anti-Dumping Regulation - After a Pit Stop, Back in the Race, Journal of World Trade, Vol.29 No.2, April 1995, pp.63-64.

27. The AAD (article 2.4.1) provides that the exchange rate used should be the one in effect on the date of the transaction being examined. In the event that the rate shows continued volatility, exporter is permitted 60 days to reflect the exchange rate fluctuation in the prices.

28. See, Section 773A (b) of the United States Tariff Act as amended by Section 225 of the URAA. Under the previous US law, when converting the foreign currencies during an anti-dumping investigation, the United States did no use the same exchange rate actually used by the parties to the transaction. Instead, the United States was relying on an exchange rate determined by the Federal Reserve Bank.

29. Although, these provisions could prevent the maintenance of anti-dumping orders for prolonged periods of time, it should be recognized that 5 years is the signal for review, not rescission. For example, some Canadian findings have been extended twice under their sunset provisions.

30. See, the United States "Uruguay Round Agreement Act, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required supporting Statements", 103rd Congress, 2nd Session, House Document 103-316, Vol. 1, U.S. Government Printing Office, Washington: 1994, pp. 879-891.

31. The AAD (article 18.3) requires that its provisions "shall apply to investigations and reviews of existing measures". Section 777A (d) (2) of the United States Tariff Act as amended by Section 229 of the URAA provides for that price comparison is made applicable in original investigations only, but not in reviews. Also see, David Palmeter, United States Implementation of the Uruguay Round Antidumping Code, Journal of World Trade, Vol. 29 No. 3, June 1995, pp. 45-46.

32. The AAD (article 3.3) permits, subject to certain conditions, cumulation of imports in assessing injury only when these imports are "simultaneously subject to anti-dumping investigations". But, Section 771 (7) (G) and (H) of the United States Tariff Act as amended by Section 222 (e) authorize the cumulative assessment of volume and effect of imports in anti-dumping and countervailing investigations if petitions and/or investigations of them are filed or initiated on the same day. Also see, David Palmeter, United States Implementation of the Uruguay Round Antidumping Code, Journal of World Trade, Vol. 29 No. 3, June 1995, pp. 57-59.

33. The AAD (article 4) defines the domestic industry as "the domestic producers as a whole of the like products" and does not permit for differentiation between products of the like product concerned for captive consumption and producers of the like product for the merchant market. But, Section 771 (7) (C) (iv) of the United States Tariff Act as amended by Section 222 of the URAA provides for such differentiation and subject to certain circumstances, the USITC shall focus primarily on the merchant market for the domestic like product for the determination of market share and the factors affecting financial performance. This was an issue primarily in the steel industry. For details see, David Palmeter, United States Implementation of the Uruguay Round Antidumping Code, Journal of World Trade, Vol. 29 No. 3, June 1995, pp. 64-65.

34. The AAD (article 2.2.2) provides for the use of the actual profit realized by other exporters in the exporting country.

35. This requirement does not appear in the AAD which does not specify how the adjustment should be computed. Also see, Edwin, Vermulst and Paul Waer, the Post-Uruguay Round EC Anti-Dumping Regulation - After a Pit Stop, Back in the Race, Journal of World Trade, Vol. 29 No. 2, April 1995, pp. 58-60.

36. At the Marrakesh meeting, Ministers decided that the issue of circumvention of anti dumping duties (an issue raised by the United States for negotiations, much discussed but excluded from the agreement) would be remitted to the Committee on Anti-Dumping Practices, on account of the failure of negotiators to agree to a suitable provision.

37. For example, in the case of the United States, Section 781, Title VII of the United States Tariff Act of 1930, as amended by Section 230 of the United States Uruguay Round Agreement Act of 8 December 1994; and in the case of the EU, Article 13 of the new EU Regulation No. 3283/94 of 22 December 1994.

38. For details see, U.S. International Trade Commission, the Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements, Investigation No. 332-344, Publication 2900, June 1995.

39. See, the EU Regulation No. 3283/94 (article 2.7) and Section 773 (c) of the United States Tariff Act as amended by Section 224 of the URAA. At a recent WTO review of the U.S. implementing legislation on anti-dumping, the legal validity of having such provisions was challenged on the ground that the AAD does not draw a distinction between market and non-market economies and contains no separate provisions applicable to non-market economies only, and article 18.1 of the AAD provides a legal ground for that no specific action against dumping of exports from another member can be taken except in accordance with the provisions of the AAD. See WTO document G/ADP/W/30 and G/SCM/W/37, 12 July 1995, p.12.

40. It refers to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994, which recognizes the special difficulties that may exist in determining price comparability in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State and in this connection that a member may use as the normal value for a product imported from that country the prices which prevail generally in its markets for the same or like products or a value for the product constructed on the basis of the price for a like product originating in another country, so long as the method used for determining normal value in any particular case is appropriate and not unreasonable. See, Analytical Index - Guide to GATT Law and Practice, 6th Edition, Geneva, 1994, pp. 209-210.

41. According to Mr. Jeffrey E. Garten, former Under Secretary of Commerce of the United States for International Trade, under the US definition, the non-market economy countries would include China, Russia, other former Soviet republics -including Ukraine, Kazakhstan, etc. as well as Romania, Hungary, and the Czech and Slovak Republics. See World Competition, Vol.17 No.4, June 1994, pp.140-1.

42. For details of the Agreement on Subsidies and Countervailing Measures and its background see Chapter IV, The Outcome of the Uruguay Round: An Initial Assessment, Supporting Papers to the Trade and Development Report, 1994, pp. 89-105.

43. Hence, domestic policy adjustments on subsidies would be more tolerable under this agreement (subsidies on agriculture - domestic and export - are covered in the Agreement on Agriculture).

44. By definition, prohibited subsidies are considered specific. However, it should be noted that there is some confusion between being deemed to be de jure specific and being de facto specific.

45. See George Kleinfeld and David Kaye, Red Light, Green Light ? The 1994 Agreement on subsidies and Countervailing Measures, Research and Development Assistance, and U.S. Policy, Journal of World Trade, Vol.28 No.6, December 1994, pp.43-63.

46. As a matter of fact, many developing countries which accepted the Tokyo Round version were required to accept commitments to phase-out their export subsidies, as a condition for benefitting from the 'injury test' in countervailing duty investigations. Under the Uruguay Round agreement, such impositions would no longer be possible. Hence, domestic policy adjustments on subsidies would be more tolerable under this agreement (Subsidies on agriculture --- domestic and export --- are covered in the Agreement on Agriculture).

47. Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

48. The EU has introduced a separate implementing legislation on subsidies and countervailing measures (i.e. separate from that dealing with anti-dumping), namely Council Regulation No. 3284/94 which is therefore essentially different from the previous EU legislation - Regulation (EC) No. 2423/88. This has been justified by the European Commission by the more detailed nature of the new ASCVM, by the increasingly distinct procedures with regard to the countervailing and anti-dumping investigations, and by the consequent need to give the countervailing instrument greater autonomy. Depending on the issues concerned, the Regulation reproduces exactly the same wording as that used in the ASCVM. In a number of respects, however, the language used in the Regulation differs from that of the ASCVM. Moreover, the Regulation contains additions which may not be found in the ASCVM. Finally, on several issues, more detailed provisions from the EU legislation on anti-dumping have been used in the Regulation. Most of the changes to implement the procedural provisions of the ASCVM are the same as described above in the section on anti-dumping. Other specific changes to the new EU Regulation, Canadian SIMA Act, and Title VII of the United States Tariff Act of 1930 as amended by Subtitle B of Title II of the URAA to reflect ASCVM include: definition of subsidy, specificity, actionable (or countervailable) subsidy, rules for the calculation of the amount of subsidy, non-actionable (or green light) subsidies, de minimis subsidies, developing countries, countervailing duty rates. The provisions of the ASCVM concerning definition of subsidy, actionable (or countervailable) subsidy and non-actionable (or green light)

subsidies have been almost literally reproduced in the implementing legislation of the EU, Canada and the United States.

49. As under previous practice, the Commerce Department would apply these de minimis thresholds on an aggregate, rather than a programme-by-programme, basis.

50. This is particularly important for many developing countries. The United States, under the Tokyo Round Code, however, only applied such "injury test" in countervailing duty cases to those countries that accepted the Code, including developing countries that agreed to enter into 'satisfactory' commitments to phase out their export subsidies. Section 261 of the URAA repeals Section 303 of the United States Tariff Act 1930 to apply the injury test to all WTO members.

51. For example, in the case of the United States, Section 781, Title VII of the United States Tariff Act of 1930, as amended by Section 230 of the United States Uruguay Round Agreement Act of 8 December 1994; and in the case of the EU, Article 13 of the new EU Regulation No. 3283/94 of 22 December 1994.

52. Typically, new entrants have non-price disadvantages of consumer unfamiliarity and lack of recognition. Frequently, this disadvantage must be overcome by offering lower prices.

53. So far, the following developing countries have submitted or notified the intention of submitting to the WTO of their national legislation on anti-dumping and countervailing practices: Argentina, Bolivia, Brazil, Chile, Costa Rica, Cuba, Cyprus, Ecuador, Guatemala, Honduras, India, Jamaica, Republic of Korea, Mexico, Mauritius (countervailing), Malaysia, Nicaragua, Nigeria, Peru, Singapore, Slovenia, Thailand, Trinidad and Tobago (anti-dumping), Turkey, Venezuela and Zambia.

Table 1

Total anti-dumping actions initiated during the period of 1 January 1993 - 31 December 1994 and outstanding actions as of the end of 1994

Actions taken by	Total actions	Of which			Outstanding actions as of the end of 1994
		against developed countries	against Developing countries	against countries in Eastern Europe	
United States	262	123	129	10	292
Australia	112	53	59	-	77
Canada	106	58	38	10	71
EU	94	10	61	23	73
Brazil	44	15	23	6	18
Mexico	44	20	22	2	42
Argentina	40	9	28	3	-
Turkey	20	2	8	10	27
New Zealand	21	2	19	-	21
South Africa	18	8	10	-	1
Korea, Rep. of	10	6	3	1	7
Colombia	8	7	1	-	4
India	7	1	5	1	5
Peru	5	-	5	-	-
Austria	4	-	-	4	-
Chile	4	-	4	-	-
Thailand	3	2	1	-	-
Venezuela	3	-	2	1	-
Singapore	2	-	2	-	-
Japan	1	-	1	-	2

Source: GATT Documents: Semi-Annual Reports under Article 14:4 of the Tokyo Round Code on Anti-Dumping Practices (ADP/102), (ADP/114), (ADP/127);

Semi-Annual Reports under Article 16:4 of the ASG (G/ADP/N2, ADP/134).

Table 2

Total subsidies and countervailing actions initiated during the period of 1 January 1993 - 31 December 1994 and outstanding actions as of the end of 1994

Actions taken by	Total actions	Of which			Outstanding actions as of the end of 1994
		against developed countries	against developing countries	against economies in transition	
United States	85	26	58	1	97
Australia	12	10	2	-	2
Chile	4	-	4	-	-
Austria	4	-	-	4	-
Brazil	3	2	1	-	1
Canada	2	1	1	-	1
European Union	2	-	2	-	1
New Zealand	1	1	-	-	1
Peru	1	-	1	-	-
Argentina	1	1	-	-	-

Source: GATT documents: Semi-Annual Reports under Article 2:16 of the Tokyo Round Code on Subsidies and Countervailing Measures (SCM/170, SCM/180, SCM/183).

Semi-Annual Reports under Article 25:11 of the ASCVM (G/SCM/N/4, SCM/190).

Table 3

United States anti-dumping investigations and merchandise imports, by country group and for selected countries July 1991-June 1993

Country, group of countries	Number of cases	Shares in total cases	Partner share in U.S. imports	Percentage of cases with restrictive outcomes[a]	Share of partners exports to the United States subject to investigation
	1991-1993	July 1991-June 1993	1991	July 1991-June 1993	Fiscal year 1992
All countries	128	100	100	33	1.3
Developed countries	60	47	60	38	..
Developing countries	49	38	37	56	..
Eastern European countries[b]	19	15	4	56	..
European Communities	34	27	19	38	1.2
Japan	11	9	18	22	1.2
Canada	10	8	18	33	0.6
Korea, Rep. of	10	8	4	60	5.0
Brazil	10	8	1	43	2.6
Taiwan Prov. of China	7	5	5	67	0.3
Mexico	6	5	6	50	0.3
China	6	5	3	75	0.1

Source: Reproduction of Table IV.2 of GATT, Trade Policy Review, United States 1994, Volume 1, June 1994, which is based on USITC, UNSO-COMTRADE and GATT Secretariat estimates.

[a] Negotiated export restraints such as price undertakings are counted as restricted outcomes.

[b] Including all republics of the former Soviet Union.

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IDENTIFICATION OF AREAS IN WHICH TECHNICAL COOPERATION SHOULD BE STRENGTHENED

Report by the UNCTAD secretariat

GE.95-53989

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INTRODUCTION[1]

1. A fundamental objective of technical cooperation in the international trade area should be to facilitate increased and more effective participation of developing countries, as well as of economies in transition, in the new international trading system. The extent of such participation will be influenced not only by the supply conditions in each country, but also by the evolution of the international trading system under the impact of such major factors as globalization and liberalization in the world economy. In this regard, the implementation of the Uruguay Round Agreements forms the core of a new, more open and rule-based trading system, whereas regional trade-related initiatives can also be an important factor.

2. In the context of the terms of reference of the Ad Hoc Working Group, the identification of areas for strengthened technical cooperation has logically to take as a point of departure the results and implications of the Uruguay Round agreements.[2] The provisions of these agreements have substantial development implications; in general, the scope of autonomy of individual countries in undertaking trade-related policy measures is restricted, although in some instances these agreements offer to developing countries, and in several cases to economies in transition, a measured degree of flexibility in coping with the respective obligations. The basic thrust of these agreements is that the general and detailed implementation of rights and obligations is the best means to move forward the economic development process through international trade in goods, services and technology.

3. Participation in the international trading system encompasses a two-pronged process: first, increased participation in international trade itself through increased exports and imports, with the consequent improvements in levels of investment, employment, and general economic conditions; second, increased and more effective participation in the multilateral or regional frameworks for international trade. These processes call for technical cooperation in four broad priority areas:

(a) enhancing export supply capabilities;
(b) improving national policy-making, including through measures aimed at making full use of the new trading opportunities and of the new possibilities for action to defend the country's interests and rights;
(c) building institutional and human resource capacities; and
(d) strengthening participation in the multilateral and regional frameworks and negotiations processes.

4. In undertaking technical cooperation, the requirements of countries concerned are not uniform. An important aspect, as has been already identified by the Ad Hoc Working Group at its first session, is the need to assist the least developed countries, as well as net food-importing developing countries to confront their specific problems of adjustment to the post-Uruguay Round trading system.

5. UNCTAD's integrated approach to trade, environment, services, technology and investment issues gives it a unique role in responding to, and in the design of, technical cooperation in the area of international trade in a way that brings into focus the various development dimensions and policy options. UNCTAD's technical assistance can be mobilized to support individual countries or groups of countries in the identification of national interests and policy options in multilateral trade negotiations, and in building national capacities aimed at maximizing the gains from trade liberalization within their general economic and development policies and strategies. Other international organizations,

particularly the WTO and ITC, also provide technical cooperation as regards international trade, for which, as defined below, complementarities and synergies should be sought.

6. The question of the expansion of export capabilities and improvement of the investment environment, as well as the technical cooperation requirements in those areas, has been dealt with extensively by the previous Ad Hoc Working Group on Expansion of Trading Opportunities for Developing Countries, as reflected in its Final Report to the Trade and Development Board.[3] Particularly important here is the role of the private sector in the developing and transition economies. In particular, regard might be given to the possibilities of developing complementarities among technical assistance activities to expand trade and those related to enterprise development and privatization. However, this report does not consider the technical cooperation requirements to improve the day to day operations of enterprises, nor practical measures to facilitate their trade and cut down transaction costs, as these issues are extensively dealt with in other UNCTAD bodies.

7. The present report concentrates on technical cooperation requirements in the new international trading context in terms of adapting national policies and reinforcing institutional structures, especially human resources and capacity building, needed for the effective participation of developing countries and economies in transition in the evolving international trading system. While the report reflects a number of UNCTAD technical cooperation activities, its presentation of technical cooperation requirements is not only in terms of UNCTAD's own programmes, but rather sets out general technical cooperation requirements to cope with the identified problems in this area. Conversely, broader technical cooperation programmes of UNCTAD are described in other documentation, particularly in the context of the Working Party on the Medium-term Plan and the Programme Budget.[4]

I. SPECIFIC AREAS OF TECHNICAL COOPERATION

A. National policy-making capacity

8. National trade policies become a crucial factor in translating new trading opportunities into concrete benefits. Technical cooperation under this heading should be focused, in accordance with the terms of reference of the Ad Hoc Working Group, on the following main areas: (a) market access in goods and services and (b) implications of the new rules. Within these areas, a special emphasis should also be given to the problems of least developed countries.

(a) Market access in goods and services

9. As already seen from earlier findings[5] which were presented to the first session of the Ad Hoc Working Group, in respect of the Agreements on Agriculture and on Textiles and Clothing, new market opportunities in the area of trade in goods, particularly for the potential expansion of exports of developing countries and economies in transition, may be significant. Technical cooperation for the expansion of trading opportunities for developing countries has been examined in the previous Ad-hoc Working Group, including on issues related to export promotion and marketing.[6]

10. On 1 January 1995, with the entry into force of the WTO Agreement, the first stage of tariff reductions agreed during the Uruguay Round was implemented. Thus, the questions arise: what do these tariff reductions mean, particularly for developing and transition economy countries? What are the products affected? And how can the opportunities be exploited? The same questions should be

answered with regard to the existing or emerging trading opportunities flowing from the regional trading arrangements. In addition, many developing countries will be facing a problem of erosion of preferential tariff margins under the GSP and other preferential arrangements, and major changes in various schemes. All these are issues that can best be addressed at the individual country level; hence the need for technical assistance to be refocused and oriented to individual countries and, in certain cases, perhaps at the sub-regional level.

11. Technical cooperation in the area of market access might start, on the one hand, from the tariff reductions in manufactured products and, on the other hand, from the specificities of the agreements on agriculture and on textiles and clothing. Cooperation could be oriented towards the following activities: first, identification of products and market access conditions, in terms of customs tariffs, in the light of actual and potential export interests of individual countries - or groups of countries (the sub-regional level); second, following closely the operation of the mechanisms set up to put into effect the relevant agreements in agricultural products and in textiles and clothing, with a view to anticipating new market opportunities (for instance, in those agricultural products subject to minimum access commitments, and in those textile and clothing products included in each integration phase, including the use of transitional safeguards in both agreements); third, providing assistance in connection with the problems faced by the countries which are not members of the WTO.

12. One of the by-products of UNCTAD's previous technical assistance programmes is a computer software prepared for the quantitative analysis of market access conditions, which could be adapted, along with UNCTAD's data base on trade and trade control measures (TRAINS), to process information on market access conditions for particular products of interest to individual countries. At the request of a number of developing countries, UNCTAD has already worked intensively on these issues, preparing documentation with quantitative analyses and organizing seminars and workshops in capitals, including with private sector participation. Collaboration arrangements are already in place with institutions such as the Interamerican Institute for Cooperation in Agriculture (IICA) and the International Textiles and Clothing Bureau (ITCB). These activities need to be continued and intensified, and new approaches to finance them should be explored, involving contributions from beneficiary countries themselves, cooperation among developing countries, and private sector participation.

13. As for technical cooperation on trade in services, there is need to assist countries in identifying and pursuing new export opportunities in different services sectors, including through access to information networks and temporary movement of natural persons as services suppliers. Many countries also need assistance in preparing for on-going and future negotiations under GATS, as well as strengthening their policy-making capacities in this field (through needs-tailored programmes such as CAPAS[7]). This will involve technical cooperation in the following specific areas:

- effective implementation of GATS Articles IV ("Increasing Participation of Developing Countries") and XIX ("Negotiation of Specific Commitments");
- support in the negotiations on outstanding services sectors (e.g. maritime transport and telecommunications) and in the future negotiations under the GATS on safeguards, subsidies and government procurement;
- identification and making use of the opportunities provided by GATS, as well as studying the feasibility of adapting GSP schemes to trade in services;
- preparation for negotiation on services in various regional contexts;
- identification of policy options for dynamizing the role of producer

services to raise the level of competitiveness of national economies, improve employment opportunities and increase the knowledge-intensity of human capital;

- strengthening the capacities of developing countries in the services sectors and identification of the opportunities for their services exports.

(b) Implications of the new rules

14. It has been widely acknowledged that after the Uruguay Round a new rule-based trading system has emerged, with a strengthened legal and contractual basis. Against this background the following three subjects require attention: (a) strengthening participation in the multilateral trading system and multilateral negotiations; and adapting national legislation to the new multilateral rules and disciplines; (b) creating or strengthening a trade policy community comprising, in particular the private sector and its organizations, legal and consultative firms, consumer organizations, academic and research institutions, and integrating it into national trade policy formulation; and (c) improving governmental mechanisms for trade policy coordination.

15. The variety, multiplicity and complexity of the agreements that form part of the WTO Agreement pose already substantial problems to highly developed countries and almost insurmountable ones for developing countries and transition economies. In particular, the first year of the WTO's existence demonstrates that there will be a frequent use of its improved dispute settlement mechanism. Developing countries would both have to defend their respective policies and pursue their WTO rights in the dispute settlement process. In this area, technical cooperation should focus on each individual country's needs and objectives and be geared to their specificity.

B. Institutional capacity building and human resource development

16. The need for strengthening and improving institutions and creating a variety of skills in developing countries and economies in transition has become even more urgent given the growing complexity of multilateral trade agreements and their scope, not to mention the difficulties associated with domestic economic and trade reforms. Three areas, as in particular mentioned above, stand out as core activities: (a) trade supporting institutional structures; (b) training; and (c) management of trade and trade-policy related information and data.

(a) Trade supporting institutional structures

17. The most pressing need arises from the implementation of the various Uruguay Round agreements, especially with regard to the WTO notification requirements. Apart from substantive obligations and rights, there are enormous procedural requirements facing the WTO members. Thus, a review of notification requirements under the WTO Agreements suggest that there may be over 160 such requirements on a regular or ad hoc basis[8]. In some cases, the implementation of notification obligations may affect substantive rights of a WTO member, including the use of provisions on differential and more favourable treatment by a developing country member. WTO members will also undergo periodic trade policy reviews which represent an additional institutional burden, especially in the case of developing countries. Active participation in the WTO activities will also require constant involvement in the work of WTO councils, committees and working parties, as well as in the on-going negotiations on some specific issues (e.g. on services sectors). Many developing countries will thus need to set up administrative structures to provide support for the implementation of

the WTO agreements. For example, the establishment of enquiry points and publication of laws and regulations to meet transparency obligations would imply new structures or adaptation of existing institutional machinery.

18. Furthermore, on-going and future trade negotiations and the ever-widening areas of domestic policy covered by multilateral trade rules make it imperative for developing countries and economies in transition to create national coordinating institutions that, on the one hand, respond to the new international environment, and on the other, provide channels for the participation of all interested domestic sectors and interest groups in the formulation of national trade policy with the aim of defending multilateral trade rights.

(b) Training

19. The rapidly changing patterns of production and trade influenced by the phenomena of globalization and liberalization underscore the need for training and human resource development to adequately respond to these changes. Technical cooperation activities in trade and trade-related areas should build on experience accumulated in this field through such programmes as, for example, TRAINFORTRADE, which is an innovative programme designed by UNCTAD in cooperation with ITC, and complements the latter's activities. TRAINFORTRADE encompasses a range of training programmes in the area of trade policy and international commercial diplomacy aimed at middle and senior level personnel in the public and private sectors. It also addresses trade needs and trade practices, including in such areas as commodities, trade financing, risk management, investment and transnational corporations. This programme is based on the principles that the challenge lies not only in training a critical mass of highly qualified negotiators and trade policy analysts, but also of development of training institutions and forming national trainers. The latter is a sine qua non for the sustainability of training capacities and informed policy-making. This calls for and encourages close cooperation among all parties concerned including training institutions, policy-makers and business community.

20. Technical cooperation should also aim at enhancing the capacity of resource-deficient countries to effectively use the machinery provided by the WTO dispute settlement mechanism to safeguard their rights. In a broader sense, the objective is to strengthen national academic and research institutions which can conduct policy analysis and form experts on a continuous basis.

(c) Management of trade and trade-related information and data

21. An essential element in human resource development in the trade and trade-related sectors is the capacity to cope with increasing information and data flows for the purposes of supporting trade negotiations, facilitating and increasing efficiency in conducting international trade and identifying markets. Technical cooperation in this area must aim at increasing access to and use of new information technology and designing efficient and effective trade data and information systems to upgrade largely unmet needs of developing countries. Technical assistance programmes such as ASYCUDA, Trade Analysis and Information Systems (TRAINS), Global Trade Point Network (GTPnet), Software for Market Access and Restrictions to Trade (SMART) undertaken by UNCTAD, as well as ITC's programmes of trade information for enterprises, have all positively contributed to enhance the capacity to trade and the participation of the developing countries in the international trading system.

C. Participation in the multilateral and regional frameworks and negotiations processes

22. Technical cooperation under this heading may include three components: (a) support for countries in their accession to the WTO; (b) current and future negotiations and (c) new and emerging issues.

(a) Support of countries in accession to the WTO

23. Accession to the WTO is an important initial step in the integration of individual countries into the international trading system, in that it allows them the benefit of multilateral rights and the possibility of defending their trade interests in a multilateral legal framework. On the other hand, accession to the WTO will require adaptation of these countries' foreign trade legislation, regulations and practices to the multilateral obligations under the WTO Agreements, as well as the negotiation of concessions with their trading partners in order to ensure more liberal domestic market access to foreign goods and services. This is a challenging and difficult task involving huge administrative and substantive work. However, without acceding to the WTO, countries face a risk of marginalization in the world economy and international trade. Efforts should be undertaken to establish an effective governmental machinery to support the accession negotiations, with adequate authority to coordinate this process among various governmental agencies, as well as with the legislature and the private sector. It is also important to be able to meet technical and logistical requirements such as processing a substantial amount of documentation, including translating relevant legislation into WTO official languages. The complexity and sensitivity of the WTO accession negotiations presents a major challenge both for the acceding countries and the WTO itself.

24. The following areas could be identified as priorities for technical cooperation to support the WTO accession process of individual countries:

- assistance in training of national officials to increase their competence in all substantive matters under accession negotiations;
- identification of different options and scenarios for accession negotiations;
- identification of the modifications required in the national legislation to be compatible with the WTO Agreements;
- identification of priority export sectors in goods and services, as well as their market access opportunities;
- studies of aspects of the foreign trade regime of the main trading partners of an acceding country, including those which would have to be modified when a country in question attains the WTO status;
- assistance in the establishment of the necessary institutional infrastructure for the conduct and coordination of multilateral trade negotiations and data management systems to support such negotiations;
- ongoing assistance, upon request, throughout the negotiating process, including advisory missions, advice on the preparation of a memorandum on the foreign trade regime, etc.

(b) Current and future negotiations

25. An important "built-in" negotiating agenda was inscribed in the Final Act of the Uruguay Round, due to start about three to five years after the date of entry into force of the WTO Agreement (1 January 1995), pursuant to different agreements. On the other hand, negotiations are still being pursued, for instance, on certain services sectors (e.g., basic telecommunications and maritime transport). Furthermore, the process of implementation of the different

agreements, which entails the establishment and functioning of various committees and councils, the process of notifications -and their examination-, involves a certain degree of negotiating activity.[9] Here the highest degree of participation is in the best interests of the developing countries and economies in transition. In addition, it is likely that expanded technical assistance from UNCTAD will be sought by developing countries as the work of the WTO Committee on Trade and Environment will be more active and culminating before the Singapore Ministerial Conference.

26. UNCTAD has already established a comprehensive technical assistance programme on trade, environment and development. Activities undertaken under the programme include policy analysis carried out through country-specific and thematic studies, dissemination of information and training. The programme consists of a number of projects, which are -as far as appropriate- managed as a whole and which are closely linked with the work undertaken at the intergovernmental level. The programme is supported by UNDP, UNEP, IDRC, the Governments of Italy and the Netherlands, and other donors. The results of the policy-oriented analysis and other activities carried out under the programme are disseminated through workshops and seminars, publications and through secretariat reports to the intergovernmental machinery.[10]

27. The analysis and debate undertaken so far in the WTO shows the important contribution of UNCTAD's conceptual and empirical work in clarifying the issues and in bringing the concerns of developing countries to the fore. This has in particular been the case in the deliberations undertaken so far on the effects of environmental measures on market access for developing countries; eco-labelling; competitiveness; and the issue of transparency of environmental measures which have significant trade effects.

28. In the future, technical assistance projects could be oriented towards empirical studies that can provide a basis for the discussions that are taking place at the WTO, in particular in the context of the new trading opportunities. For example, developing countries are concerned that subsidies, particularly agricultural subsidies, could have a negative effects on the environment as well as on their trading opportunities. Similarly there is concern that the TRIPs Agreement may raise difficulties in accessing environmentally sound technologies, or that there may be need for stronger measures to prevent domestically prohibited goods from being exported to them. There are a number of other concerns which have been voiced, and need empirical and analytical underpinning. Future technical assistance programs in this area could be oriented towards examining some of these issues.

(c) New and emerging issues

29. Globalization and liberalization of economic activity are the prevailing trends in international economic relations. As governments deregulate and corporations diversify production processes in different countries, new issues arise from the fact that domestic economic and other policies have an increasingly direct impact on international trade and competitiveness. Thus, environmental regulations, anti-trust and competition policies, restrictive business practices regulations, investment policy, labour standards, and even political stability and poverty alleviation policies, among others, are issues that have emerged in the international debate.[11]

30. These issues are, in some cases, intimately interrelated and, in some other cases, already partially covered by the existing multilateral trade agreements. They relate to the harmonization of domestic policies, the coherence of global economic policy objectives, and the conflicts that appear between

multilateral disciplines, essentially those resulting from the Uruguay Round agreements, and domestic policy objectives. However, the inclusion of all of these issues in the multilateral negotiating context is still to be decided. Developing countries have consistently resisted the linkage of some of these issues (e.g. labour standards) with the framework of multilateral trade rules and disciplines, because of concern with the potential of these issues to give rise to a new generation of protectionist measures and trade remedies. Nevertheless, it would be in their interest to be fully prepared to participate effectively in the international debate on these issues in whatever fora are deemed appropriate, and to be able to defend their development concerns.

31. The Cartagena Commitment identified policy analysis and research, intergovernmental deliberation, consensus-building, and technical cooperation as major functions of UNCTAD, especially with regard to the identification and treatment of key emerging issues of trade and development.[12] Furthermore, the Trade and Development Board has also decided that UNCTAD should continue its background work and consensus building on trade issues before they become the subject of negotiations in other fora. Thus, with its expertise and analytical capabilities, UNCTAD is particularly suited to assist developing countries and economies in transition, including through its technical cooperation activities. It is expected that the forthcoming UNCTAD IX will identify more precisely the role and tasks of UNCTAD with regard to the new and emerging trade-related issues, particularly on trade and investment, and trade and competition policy.

II. DELIVERY OF TECHNICAL COOPERATION

A. Modalities

32. There is a need for a revised focus to the delivery of technical cooperation in the light of the Uruguay Round results. The UNCTAD technical cooperation programme to assist developing countries' participation in the Uruguay Round negotiations was managed by UNCTAD on a global basis, including a set of interrelated actions at the subregional, regional and interregional levels. This approach proved particularly effective, since it allowed for the identification of common interests among different developing countries and enabled them also to appreciate more fully the range of policy issues which arose from the attempt to formulate multilateral rules, particularly, on the new issues. However, at present, when countries are seeking to take advantage of opportunities arising from the Uruguay Round negotiations, it would seem appropriate to focus more attention to technical cooperation tailored to specific needs of individual countries, especially in policy areas with regard to the implementation of the Uruguay Round agreements, accessions of new countries to the WTO, and related institutional capacity building. In this context, country impact analysis of the Agreements becomes a necessary tool for assessing a country's strength and weaknesses in adjusting to the new international trading system and making use of the new trading opportunities.

33. Among technical cooperation instruments which have proved their efficiency are the following: (a) preparation of studies, including quantitative and qualitative analyses; (b) brainstorming sessions on specific issues; (c) special advisory missions to individual countries; (d) organization of seminars and workshops at the national, sub-regional, regional and inter-regional level; (e) dissemination of trade information through EDI and CD Roms; (f) capacity-building of national institutions of developing countries; (g) training programmes in capitals and in Geneva; and (h) on-going, day-to-day work with delegations in Geneva and senior officials in capitals.

34. For example, the modality of brainstorming sessions was especially

effective at the initial stages of the Uruguay Round, when some of the issues in its agenda required in-depth analysis and research, and the opportunity for discussion and exchange of views among small groups of experts and/or government representatives on an informal basis. This mechanism has the advantage of being cost effective. This approach exercised at a global and regional levels would be particularly suited in the case of new issues coming up in the trade agenda.

35. Advisory missions are normally undertaken upon request of governments, and they are most effective at the national level. They involve mostly one or a maximum of two officials or international consultants, and they are done through one-to-one interaction between the expert(s) from the organization and individual government officials. They may also involve interaction with government officials in the framework of national inter-agency bodies. These missions may also involve the delivery of specific technical advice on detailed policy issues. For example, this could relate to the preparation of a national study on the role of services in the development process of the country concerned, including the participation of services trade in its external sector; or advice on the drafting of the relevant legislation pursuant to the implementation of a multilateral trade agreement under the WTO; or analyses of the implementation of the trade policies and regulations of trading partners.

36. Seminars and workshops are organized by the UNCTAD secretariat, either as part of on-going national or regional programmes, or as stand-alone events, at the request of governments directly from capitals or through their delegations in Geneva. They may be held at the national, sub-regional, regional or inter-regional levels. They may be held in selected capitals, such as those where UN Centres exist -i.e., ECLAC in Santiago, ESCAP in Bangkok, etc., or where Governments or private institutions offer to host such events, or in Geneva and its near surroundings. Some of TRAINFORTRADE training packages (e.g. on international commercial diplomacy or trade policy) are also relevant in this regard. A number of training activities are undertaken by the WTO such as, for example regular Trade Policy Courses in Geneva for the trade officials from developing countries and economies in transition.

B. Funding and related issues

37. Financial resources for technical cooperation in the trade field, on a multilateral basis, have become increasingly scarce. The leading sources have traditionally been the regional and interregional programmes of UNDP. As an example, it can be recalled that the UNDP/UNCTAD MTN Technical Assistance Programme was made up of one subregional project (Central America), three regional projects (Africa, Asia and Latin America and the Caribbean) and an inter-regional one, fully financed by the corresponding UNDP programmes. Under present conditions, such a comprehensive programme would be impossible to set up, although, paradoxically, the need for technical assistance has substantially increased since the completion of the Uruguay Round.

38. Funds for the technical cooperation activities described in this report will need to be mobilized by developing countries and economies in transition from a variety of sources. Bilateral or multilateral country technical cooperation programmes are one possibility. Another approach which could be explored is funding from financial institutions (such as regional development banks), as part of their own technical cooperation programmes or as part of programmes related directly to specific loans (e.g.,structural adjustment loans, investment feasibility studies). Payment for services by the developing countries' private sector, where they might be obtaining information useful and/or necessary for the identification and development of specific business propositions, is another option. Another approach that might also be explored

would perhaps be the setting up of a plurilateral trust fund, with funds from some of the more developed developing countries, under the general objectives of cooperation among developing countries. It should be noted that an UNCTAD trust fund has been established based on the recommendations of the UNCTAD Standing Committee on Developing Services Sectors, to support technical assistance activities on services. This is in addition to the CAPAS project in Africa which is supported by both governmental and private donors.[13]

III. CONCLUSIONS AND RECOMMENDATIONS

39. The fact that the WTO Agreements involve an unprecedented increase of obligations for the majority of developing countries has important implications for their future trade and development strategies, as well as for their participation in the international trading system:

(a) These obligations are generally oriented towards equalizing basic conditions for competition of the WTO members in the international trade. Although many agreements have provisions on differential and more favourable treatment with regard to developing countries (and the least developed countries, in many cases, are totally exempt from obligations), the basic thrust of new obligations is that they assume the majority of developing countries are fully equipped to compete in world markets, and that their Governments have the administrative capacity to fulfil their obligations and effectively pursue their interests in the WTO framework. The adoption of the WTO agreements implies major institutional changes within the Governments, including elaboration of new legislation such as that in the area of anti-dumping and countervailing measures.

(b) An active pursuit of trade rights will also depend on a country's ability not only to use the WTO dispute settlement mechanism as a last resort in the case of a trade conflict, but to take full advantage of the relevant implementing legislation, regulations and administrative procedures of its trading partners.

40. In order to participate effectively in the post-Uruguay Round trading system, developing countries and economies in transition will need a substantial adaptation and institution building which should also be supported by technical cooperation. At present, the majority of developing countries and economies in transition do not have the required institutional capacities and structures that would enable them to use the WTO system as a principal instrument of their trade policies. This situation will also affect directly their ability to meet the present and future obligations under the WTO framework. The rapidly unfolding international trade agenda, which will obviously intrude deeper into domestic policies, is another reason why such efforts are necessary and urgent.

41. The present technical cooperation needs and requirements in the area of international trade are vast, and resources limited. The various international organizations involved must therefore work together on the basis of their particular mandates and acquired expertise. There is a need for:

(a) achieving complementarities and synergies not only between UNCTAD and WTO, but with other international, regional and sub-regional institutions, such as ITC, the World Bank, WIPO, SELA, the regional economic commissions, the regional development banks, and the regional and sub-regional integration mechanisms;

(b) seeking cooperation and financing not only from multilateral sources, but also at the bilateral and other levels, including with private foundations and private sector institutions such as Chambers of Commerce and academic

institutions. Cost-sharing of technical cooperation projects by beneficiary countries should be also pursued more actively. In UNCTAD, special efforts should be devoted to fund-raising activities in this area.

42. The basic focus of technical cooperation activities and, in particular those of UNCTAD, should be to assist developing countries and economies in transition to identify the main issues and policies concerning their integration into the international trading system in terms that would increase their economic benefits and equip them with better capacities to compete in international trade, while safeguarding their vital domestic developmental priorities and concerns. To this end, technical cooperation should concentrate on institution building. Relevant activities should be coordinated between UNCTAD and the WTO and with other relevant international organizations.

43. The basic objectives of such technical cooperation would be: (a) to improve participation of developing countries and economies in transition in the international trade policy decision-making, in particular in the WTO system, and to contribute to the formulation of adequate development-oriented national trade policies; (b) to increase their capacities in defending their rights and implementing their obligations in the area of international trade, particular by providing advice and expertise on the strengthening of national trade policy administrations and other aspects of institutional building; (c) to upgrade their capacities with regard to multilateral, regional and bilateral trade negotiations; and (d) to ensure greater access to trade information. These activities should be seen as an umbrella for national and international measures that would assist these countries to become full players and reliable partners in the international trading system, while specific components would be tailored to the particular needs of individual countries, including those countries currently in accession to the WTO. Special emphasis needs to be laid on least developed countries. Another important aspect is that activities should remain demand-driven, i.e. requests and initiatives should come from the countries concerned themselves, while the UNCTAD secretariat would, on its part, fully inform the Governments of its capabilities to provide technical assistance.

44. Technical cooperation activities should comprise measures both at the national and inter-country levels and should be supported by funding from UNDP, international financial institutions and bilateral donors.

45. UNCTAD's role in providing technical cooperation in supporting developing countries and economies in transition in the international trading system could be elaborated further, agreed at UNCTAD IX and completed by the Trade and Development Board.

ANNEX

Illustration of UNCTAD technical cooperation activities with regard to the international trading system

In accordance with its functions and intergovernmental mandates,[14] UNCTAD technical cooperation programmes and projects in the concluding phase of the Uruguay Round and in the post-Uruguay Round period have addressed the following main issues of concern and interest to developing countries and, in certain cases, to the economies in transition:

- identification and evaluation of the impact on individual countries of implementing specific WTO Agreements such as the Agreement on Agriculture, Agreement on Textiles and Clothing, Agreement on Anti-Dumping, Agreement on Subsidies and Countervailing Measures, Agreement on TRIMs, etc.;

- studies of various services sectors in developing countries and their potential contribution to the development and expansion of exports (e.g. telecommunications, financial and business services, transport, construction, audiovisual services, professional services, tourism, etc.)

- analysis of the Uruguay Round implementing legislation of individual developed countries and their impact on developing countries' trade;

- analysis of the built-in work programme in the WTO Agreements and identification of developing countries' priorities and options;

- support of developing countries' participation in the on-going WTO negotiations on services sectors (e.g. financial services, telecommunications and maritime transport);

- analysis and identification of the main problem areas and options regarding trade and environment;

- analysis of the new and emerging issues on the international trade agenda and their implications for developing countries trade and development concerns: trade and competition policy, trade and investment, etc.

- analysis and identification of the main issues involved in the accession of new countries to the WTO;

- support of the WTO accession negotiations through various activities such as identification of various scenarios of accession process; study of national legislation of an acceding country and its conformity with the WTO Agreements; assistance in the preparation of the Memorandum on the Foreign Trade Regime and other documents required in the negotiations (e.g. answers to questions from the WTO members, offers in goods and services); study of legislation and positions of the main trading partners of an acceding country; technical support such as translation of various documents both into the WTO official languages and into national languages of acceding countries;

- organization of seminars and brainstorming meetings at national, regional and inter-regional level to discuss the above issues;

- organization of advisory missions to countries concerned on specific issues of their participation (integration) in the international trading system;

- delivery of TRAINFORTRADE training packages. One such course (14 weeks) is on International Commercial Diplomacy, which encompasses a series of modules on the various components of the WTO agreements (22 modules), as well as on new trade-related issues, bilateral and regional negotiations,

  and negotiating skills and strategies. A concise, one-week course on the new multilateral trading framework is also available. Other relevant TRAINFORTRADE packages are on trade policy, trade and environment, and control of restrictive business practices;

- organization of training of officials from individual countries tailored to their specific trade policy problems through their attachment to international law firms, international consultants and UNCTAD secretariat.

- dissemination of trade information (TRAINS system) on market access conditions through CD-Roms to developing countries, economies in transition and regional groupings.

Endnotes

1. This report should be read in conjunction with the report by the UNCTAD secretariat "An analysis of the implications of the new rules deriving from the Uruguay Round Agreements on safeguards, anti-dumping, and subsidies and countervailing measures", doc. TD/B/WG.8/6 dated 7 November 1995.

2. For details, see the Trade and Development Report, 1994, Part III and "The Outcome of the Uruguay Round: an Initial Assessment", Supporting Papers to TDR 1994.

3. See: Final Report of the Ad Hoc Working Group on Expansion of Trading Opportunities for Developing Countries (doc. TD/B/41(1)/7 dated 5 August 1994), especially its Chapter I., Section E dealing with technical cooperation in building export capabilities and expanding market opportunities, and Chapter II, Section A related to the policies at the national level for building export capabilities. In this context, see also the report by the UNCTAD secretariat (doc. TD/B/WG.4/10 dated 3 January 1994), which describes technical cooperation requirements for enhancing the export supply capabilities of developing countries

4. See: doc. TD/B/WP/92 dated 9 October 1995, which reviews the technical cooperation activities of UNCTAD and their financing, as well as doc. UNCTAD/PSM/TCP/1, August 1995.

5. See doc. TD/B/WG.8/2 and Add.1, prepared for the first meeting of the Ad-hoc Working Group on Trading Opportunities in the New International Trading Context, as well as studies on agriculture (UNCTAD/ITD/16) and textiles (UNCTAD/ITD/17).

6. See: doc. TD/B/WG.4/10, dated 3 January 1994.

7. CAPAS stands for: "Coordinated African Programme of Assistance on Services". CAPAS focus on building policy analytical and decision-making capacity in the areas international trade in services and domestic service sector in general in the participating countries.

8. WTO doc. G/NOP/W/2/Rev.1 dated 25 September 1995.

9. For example, under the Agreement on Agriculture, the negotiations for continuing the reform process will be initiated one year before the end of the implementation period (i.e. in 1999). Under the GATS, successive rounds of negotiations are envisaged to begin not later than five years from the date of entry into force of the WTO Agreement (i.e. in 2000). Other agreements envisage different reviews which will also require certain negotiating activities such as, for example, the case of the Agreements on TRIMs, Anti-Dumping, Preshipment Inspection, Rules of Origin, Subsidies and Countervailing Measures.

10. For a detailed analysis of UNCTAD's technical assistance programs on trade, environment, and development, see TD/B/Wg.6/Misc.1.

11. For a detailed discussion, see document TD/B/EX(10)/CRP.1 "New and emerging issues on the international trade agenda". Note by the UNCTAD Secretariat. 1 March 1995. Prepared for the Tenth Executive Session of the Trade and Development Board, Geneva, 4 May 1995.

12. The Cartagena Commitment, Part III, paras. 50, 52.

13. Government of France, International Development Research Centre (Canada) and Carnegie Corporation of New York (United States).

14. The recent mandates for UNCTAD technical cooperation activities in the area of international trade were agreed at UNCTAD VII (para. 105 (9) of the Final Act) and UNCTAD VIII (para. 163 of the Cartagena Commitment) and elaborated further in the decisions by the Trade and Development Board, particularly agreed conclusions 410 (XL) and 419 (XLI) on the Uruguay Round, as well as in the Board's agreed conclusions 421 (XLI) on the policy review of UNCTAD's technical cooperation.